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IN THE

Supreme Court of the United States

October Term, 1956.

No. 318

ELMER LYSFJORD and WALTER R. WALDRON, doing business as aabeta co.,

Petitioners,

vs.

THE FLINTKOTE COMPANY, a corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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THE FLINTKOTE COMPANY, a corporation,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners Elmer Lysfjord and Walter R. Waldron, doing business as the aabeta co., pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on March 29, 1957.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on March 29, 1957. Appendix A, *infra* [R. 1320]. A timely Petition for Rehearing filed on May 29, 1957 (separately certified to this Court) was denied on the 3d

day of June, 1957 [R. 1321]. Jurisdiction of this Court is invoked pursuant to 1254 and 2101 of the Judicial Code (62 Stat. 928, 962; 63 Stat. 104; 28 U. S. C. A. Sec. 1254). The jurisdiction of the District Court was evoked because a question arises under a law relating to commerce, the Sherman Antitrust Act.

Citations to Opinions Below.

This case arose out of a jury verdict in favor of petitioners [R. 104]. The opinion of the Circuit Court of Appeals, printed in Appendix A, *infra*, p. 1 [R. 1273], is reported in ..... F. 2d .....

Statutes Involved.

The statutes involved are the Sherman Antitrust Act (26 Stat. 209) 15 U. S. C. A. Sections 1, 2, and 7; the Clayton Act, Section 4 (38 Stat. 730) 15 U. S. C. A., Section 15; Federal Rules of Civil Procedure; 28 U. S. C. A. 728, *et seq.*, Rules 43, 51, 61; Rules of the United States Court of Appeals for the Ninth Circuit, Rule 20, 2(d).

Statement.

This petition arises out of a suit for treble damages under Sections 1, 2, and 7 of the Sherman Act and Section 4 of the Clayton Act (15 U. S. C. 1, 2, 7, and 26). The cause of action arose out of a conspiracy to destroy petitioners' acoustical tile contracting business by depriving them of their only available source of acoustical tile with which to carry on their business [R. 17 *et seq.*]. Petitioners were deprived of their source of acoustical tile on or about February 19, 1952.

Conspiracy.

The *only* affirmative defense offered at the trial was that Flintkote's act in terminating petitioners' source of acoustical tile was the independent act of Flintkote based upon sound business reasons. Under explicit instructions, *infra*, pages 6-10, the jury found that Flintkote's act was the result of a conspiracy between Flintkote and petitioners' competitors and was done with a knowing and willful purpose of destroying petitioners' business and preserving the non-competitive *status quo* of the acoustical tile contracting business in the Los Angeles area as charged in the complaint.

Flintkote appealed from the judgment entered against it, based on a jury verdict for $50,000, trebled by the court to $150,000, plus $25,000 attorney's fees, plus $165.70 costs, minus $20,000 received by petitioners from certain original parties defendant other than respondent Flintkote pursuant to a covenant not to sue, or a total net judgment of $155,165.70.

The Court of Appeals in its decision [R. 1283, App. A, p. 14; *infra*] held that permitting the issue of conspiracy and Flintkote's knowing participation therein to go to the jury was not error, and that there was substantial evidence in the record to support the jury verdict. The court nevertheless held that the jury's verdict on conspiracy must be reversed because of the possible effect of three conversations related by petitioners: (1) a conversation between Ragland, a representative of Flintkote, and petitioners (this conversation will be discussed *infra*); (2) a conversation between Baymiller and petitioners at the time petitioners were informed by Baymiller, Thompson, and Ragland that they could no longer purchase Flintkote tile, and in which Baymiller merely stated that there had been pressure exerted on Flintkote as a result of its sales to

petitioners, and (3) a conversation between the defendant, Krause, and the petitioner, Lysfjord, occurring subsequent to the time Flintkote withdrew petitioners' source of supply in which Krause was alleged to have told Lysfjord that he had fronted with Flintkote to force the termination of petitioners' source of acoustical tile [R. 1287-1291, App. A, pp. 19-23, *infra*].[2]

A review of the substance of conversation No. 1 between Ragland and Waldron (colloquy between counsel and court deleted) shows only that (1) the defendant Krause came to the Flintkote offices and objected strenuously to plaintiffs' competition. [R. 1289, App. p. 20,

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[1] It is respectfully submitted that (1) this statement was fully authorized and not hearsay [R. 487, 954, 993, 995-999, 1001-1002, 1004, 1057, 1071, 1072, 1096-1099]. For this court's convenience the relevant portions of the record cited here is reproduced in Appendices C and D *infra*, pages 93-97; (2) that it could not have been prejudicial in any event since it applied solely to the same subject matter contained in the Ragland statement—"conversation number one"—which was admitted by defense counsel [R. 183-184, App. B, p. 62, *infra*] and was testified to by not only Baymiller, but by Thompson, Lewis, Harkins, Krause, Howard, Hoppe, Heller, and other defense witnesses. (See quotation of this same testimony set forth in Appendix B, pp. 62-82, *infra*, with record references.)

[2] This statement of the defendant, Krause was stricken from the record and could not have been "recalled" at the time the trial court overruled defendant's Motions to Strike, as the Appellate Court erroneously concluded [R. 1290, App. A, p. 23, *infra*] since the statement of Krause was in no wise challenged in such motions to strike. It is respectfully submitted that the court's reference to this stricken testimony and its use of the same is illustrative of that court's general attitude and treatment of the evidence and the jury's verdict throughout the decision [see R. 1298-1299]. Rightly or wrongly the trial court did rule Krause's statement to be inadmissible. The reason for the Circuit Court of Appeals' discussion and apparent reliance on the same statement is difficult to understand or justify.

infra]; and (2) that "R. E. Howard was down there complaining also."[3]

Lysfjord's testimony along the same line [R. 1289, App. A, p. 22, *infra*] added only that the defendants Krause, Howard, and Newport, together with Lewis of Flintkote "all had a meeting" in which they objected very strenuously to plaintiffs being in business, and that Newport is alleged to have threatened to boycott Flintkote for supplying plaintiffs with their brand of acoustical tile.[4]

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[3]The Court's attention should be directed to the fact that plaintiff's Motion to Strike at the end of all of the evidence did not refer to this latter testimony, but only to the same testimony given by petitioner Lysfjord [R. 1214-1215].

[4]At the very commencement of the case defense counsel admitted to the jury [183-185] that "It is not denied that there were complaints made by the other Flintkote dealers in the area, that these people, * * * were competing into this area and competing on the same line of tile." The same counsel also stated to the jury [R. 773-774] that "Now sometime in the early part of February the Flintkote people received a complaint from a Mr. Krause of the Coast Insulating Products, and also about the same time from a Mr. Howard of the R. E. Howard Company. In general the basis was that here were some people that were in the Los Angeles territory that Flintkote hadn't notified either Howard or Krause about adding another account in the area, and they didn't think that was a very handsome way to treat them when they had been dealing all this time, on the basis that there were three accounts in the area here, and how come adding another one here? What is the idea back of this? What are you doing this for without notifying us? Do you think that is a fair way to treat us? *Mr. Krause apparently became rather vehement on the subject.*" (Italics ours.) This fact was duplicated many times over in the testimony of defense witnesses on direct and cross-examination, showing not "a" meeting, but repeated meetings between and among the same parties and between the same contractor defendants and other admittedly authorized agents of Flintkote for the same purposes; *i. e.*, to discuss complaints against the competition of plaintiffs [R. 949-951, 990, 1010-1011, 1017, 1018, 1046-1048, 1050, 1064-1065, 1067, 1090-1091, 1099, 1124-1125-1126, 1128, 1141-1144. This latter testimony is quoted *infra*, App. B, pp. 62-81 for convenience of this Court]. Appendices C and D, *infra*, contain additional pertinent testimony on the same point.

The Circuit Court of Appeals nevertheless weighed the evidence and its conclusion that the isolated statements of Ragland were "by far the most significant and most damaging to defendant's cause," and their admission "constituted prejudicial error"[3] [R. 1298, App. p. 32, *infra*] seems clearly to be contrary to the evidence and without support in law under the admitted circumstances in this case. Indeed, how the subject matter of any or all of the so-called "three conversations"—to the sum effect that petitioners' competitors objected to petitioners' competing (a fact admitted and affirmed throughout the record) could have been prejudicial to defendants is extremely difficult to perceive.

In this connection, it should be again pointed out that the Ragland statement was admitted subject to motion to strike. The Baymiller statement was obviously not prejudicial nor was it in any wise the subject of any objections either before the trial or appellate court. Baymiller, Thompson, and Ragland were expressly authorized and directed to inform petitioners they could no longer purchase Flintkote tile [R. 776, 809, 810, App. C, pp. 82-92, *infra*].

Instructions.

As its second reason for reversing the verdict and judgment in favor of petitioners the Circuit Court of Appeals found alleged error in jury instructions other than those pertaining to damages [R. 1300, App. A, p. 36, *infra*]. The error of the Court's ruling in this respect would seem clear upon the face of the opinion itself. For the conveni-

[3] This Court will note that the alleged hearsay of Ragland did not refer to the basic question of whether or not Flintkote knowingly joined the conspiracy, but only to the admitted fact that petitioners' competitors had complained of petitioners' competition.

ence of this Court the whole charge to the jury on this point, *given in proper sequence*, follows:

By stipulation the trial court very early instructed the jury [R. 300-301].

"Now, a conspiracy is only important here if this defendant be shown to be one of the conspirators. There might be a conspiracy which does no end of damage to a particular individual, but it is the members of that conspiracy who are responsible to it, and not persons or firms that are not in the conspiracy.

"If this defendant, acting individually for its own purposes, regardless of whether they were laudable or not, decided not to sell to the plaintiffs, then the plaintiffs just have to live with that fact, unless they have a contract. The plaintiffs aren't suing here for breach of contract.

"So it is going to be necessary for the plaintiffs, either by direct or circumstantial evidence, to establish evidence which establishes, by a preponderance of the evidence, that the defendant on trial, The Flintkote Corporation, was a member of a conspiracy and that the conspiracy was the type that is charged in the Complaint, and that these plaintiffs suffered damages as a result.

"Now, have I stated only as to one side of the coin?

"Mr. Ackerson: I am satisfied, your Honor.

"Mr. Black: That is satisfactory, your Honor."

Prior to the first quotation utilized by the Court on page 28 of its Opinion, not only the above instruction had been given, but the Court had theretofore instructed the jury as follows:

"Any manufacturer, such as the Flintkote Company, has a right to select its own customers. It has

a right generally to conduct its business in whatever way it determines.

"However, the case here is one in which The Flintkote Company is accused of being a member of a conspiracy. The Flintkote Company or anyone else engaged in private enterprise may select its own customers, and in the absence of an illegal contract, combination or conspiracy may sell or refuse to sell to any person, including these plaintiffs, for any cause or for no cause whatever. But under the antitrust laws it cannot do so if there has been a conspiracy." [R. 1235-1236.]

After reading (by stipulation of parties) certain basic parts of the complaint the Court instructed the jury [R. 1239]:

"Now, you have noted, as I read that, I mentioned the defendants but there is only one defendant here. This complaint, upon which the case is tried and from which I have just read to you, was filed against many defendants. What has happened in the case with respect to the others is not of any concern to you. We are trying the case here today as to this one defendant."

Thereafter, the Court, by agreement of the parties, named the other defendants then charged [R. 1240] that—

"There must be intentional participation in the transaction with a view and purpose to further the common design. * * *"

and that [R. 1241]:

"This brings us to the legal proposition that while any manufacturer, such as The Flintkote Company, would be privileged, acting entirely independently and as a private matter between itself and a proposed

customer, to say to a person or firm, 'We will not deal with you.'

"That if The Flintkote Company acted in concert [R. 1242] with anyone or more of the other defendants here, and the acting in concert was in violation of the law, which I will now read to you, then the conspiracy would be made out."

* * * * * * *

("If you are satisfied from all the evidence that any two or more of the defendants acted together for the purpose and with the effect of eliminating the competition in the purchase, sale or installation of acoustical tile, then you may return a verdict against the defendants and in favor of the plaintiffs, provided the evidence actually shows preponderantly that plaintiffs were damaged by such acts and conduct.") [R. 1245, 1246.][6]

The foregoing quotation (in parenthesis) quoted in the decision was followed immediately by the following additional instructions [R. 1246, *et seq.*]:

"'A primary question for you to consider is whether defendant Flintkote Company was a party to an unlawful contract, combination or conspiracy in restraint of interstate commerce or to monopolize a part of such commerce. If you find that no such unlawful combination or conspiracy existed or that The Flintkote Company was not a party to any such combination or conspiracy, even if one did exist among others, you must return a verdict for the defendant and you need not consider any other questions.'

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[6]This was not one of plaintiff's proposed instructions at all, nor did defendant make specific objection to it after being twice invited to do so [R. 1489-1490].

"In other words, one of the primary questions here is, was there a conspiracy, and if there was, was the defendant on trial today a member of that conspiracy or was it acting independently of whatever the conspirators might have been doing?

"'If you find that the defendant, The Flintkote Company, knowingly agreed with one or more of the acoustical tile contractors, named the defendants in this case, to restrict or prevent plaintiffs from competing with such acoustical tile contractors, you are instructed this would be a violation of the law and if you find that this violation resulted in damage to the plaintiffs' business or property, your verdict should be for the plaintiffs in the amount you find they have been damaged.

"'The Flintkote Company can be liable for refusing to sell acoustical tile to plaintiffs only if such refusal to sell was in furtherance of and as a consequence of a knowing participation in an unlawful combination or conspiracy.'

"In other words, we come back to the old principle that if The Flintkote Company was acting entirely on its own, without conspiracy with the other defendants, then there is no cause of action.

* * * * * * *

"You cannot find that The Flintkote Company was engaged in an unlawful transaction, combination or conspiracy solely on the basis of the fact that The Flintkote Company refused to sell or stopped selling acoustical tile products to plaintiffs. You can so find only if there is other evidence of a substantial nature which furnishes a valid basis from which the alleged fact of such unlawful conduct may be inferred. * * *"

"You must find, in addition to that, before you can find for plaintiffs, that the defendant on trial here,

> The Flintkote Company, was an actual participant in the conspiracy and was not acting independently of the conspiracy and its own interest, acting alone." [R. 1252.]

It is respectfully submitted that these instructions, when read in *proper sequence and as a whole*, could not conceivably have prejudiced defendant.

Damages.

The reversal of the Circuit Court of Appeals as it applies to the question of damages was limited to the *amount* of damages arising out of lost profits resulting from petitioners being deprived of acoustical tile with which to continue their business. The court based its ruling, in part, on two related factors: (1) that because petitioners had never owned an acoustical tile business of their own prior to their present venture, and (2) that they were therefore unqualified to give an opinion as to the amount of damage resulting from lost profits. To support its conclusion the court also pointed to the fact that neither petitioner prior to engaging in their present business had ever purchased acoustical tile nor had either petitioner ever examined the financial structure or the books of the defendant Downer Co. with which they had been formerly associated. [R. 1305.] The evidence is clear that the factors upon which the Circuit Court of Appeals relied are in no wise conclusive or, we submit, even persuasive in determining petitioners' qualifications as experts in the field. There is no evidence to support the opinion of the Circuit Court of Appeals to the contrary. Petitioners' testimony (which stands uncontradicted) shows that petitioners "were not starting a new business. We were just starting a new name. We had been in the business for a long time and had these associate contracts over the years" [R. 706]; that under these associate contracts—the last one

being with the defendant Downer Co.—petitioners had the responsibility of determining what contracts for the installation of acoustical tile would be accepted, the responsibility for computing the amount of tile necessary for a particular job and the price which would be received for such job, and were at least able to place the job for manual installation work and a division of profit or loss with any contractor they saw fit. [R. 448, 449, 450, 454, 455-456, 646, 658, 660, 713-714, 771-773, 782, 794, 829-830, 854, 856, 859, 860, 871, 964; quoted in App. C, pp. 82-91, *infra*.][7] It is respectfully submitted that the opinion of

[7]Counsel for Flintkote called as its own witnesses a representative from each of the defendant acoustical tile contractors, including the defendants, Howard, Hoppe, and Krause, as well as the top ranking officials of the Flintkote Co., including Harkins, Lewis, McAdow, Baymiller, Thompson, Ragland, and Heller. Yet defendant Flintkote failed through any such witnesses to so much as question plaintiffs' testimony as to their qualifications, the amount of damages suffered, the bases used by petitioners in arriving at their conclusions on the amount of damage or in any wise to elicit any evidence whatsoever to sustain the validity of the opinion of the Circuit Court of Appeals in its decision here as it pertains to the question of damages. The petitioners' past sales volume of at least one carload of tile per month by each petitioner, while associated with the Downer Co., was confirmed after investigation by Flintkote's own witness, Ragland [R. 829-830, App. C, p. 92, *infra*]. The fact that petitioner, Lysfjord, had been accustomed to obtaining and executing contracts totaling at least one carload per month is borne out by even the Circuit Court of Appeals' critical analysis of Lysfjord's 1951 income tax return [Footnote 34, R. 1311, App. A, p. 50, *infra*], and the jury's verdict of $50,000 for *all* damages was well within the normal expected minimum profit testified to by petitioners based upon the sale of only one carload of tile per month during the period involved by both petitioners—admittedly only one-half their past performance while in association with other acoustical tile contractors. It is to be supposed that had the points relied upon by the Circuit Court of Appeals to attack petitioners' qualifications been valid, they would have been brought out in the evidence during the trial through the defendant's numerous witnesses. As an example only of the testimony of defendant's own witnesses on direct examination [R. 794] Ragland testified that Mr. Harkins was glad to meet petitioners "and that we were glad to have two men of their capabilities handling our acoustical products."

the Circuit Court of Appeals on the above point finds no support in the evidence, and at best constitutes an attack not on the *admissibility* of the evidence, but upon the *weight* of the opinions offered which was obviously argued before the jury and considered by the jury in the trial court.

In view of the modest size of the jury verdict for *all* damages suffered by petitioners, the computation of the Circuit Court of Appeals [R. 1306, App. A, pp. 43-44, *infra*] showing a net loss of profit for each petitioner at the time of trial of $75,788.50 needs no comment here. This damage figure as it relates to lost profits, was admittedly derived from the opinion of petitioners based upon years of past performance and experience in the field and upon the minimum undisputed profit formula used in the industry.[8] The complexion of the Court of Appeals' decision on this point can be judged by its conclusions based upon the fragmentary evidence it cites to the effect that during the years, 1952, 1953, and 1954, petitioners in fact made only a profit of 5%, 11%, and 5%, respectively. The court then held [R. 1306, *et seq*, App. A, p. 44 *et seq.*, *infra*] that "There is no evidence that

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[8]Here again the court ignores the unchallenged evidence pertaining to petitioners' qualifications and proven past experience, the minimum profit formula forming the basis of their opinions, and the undisputed evidence that they were desirable acoustical tile contractors who were adequately financed. Nothing the court says here detracts in any way from the undisputed facts in the record that petitioners' proposed business, insofar as competition or damages are concerned, involved little or nothing more than the purchase, sale, and installation of tile in carload lots, and that they were each admittedly experienced in and properly financed to conduct such a business. The relative efficiency or inefficiency of the business conducted by the Downer Company or its similarity or dissimilarities would seem to be irrelevant here. Finally, the court's attention is called to the fact that defendants during the trial at no time so much as attempted to show the relevancy of any of the facts here relied upon by the Circuit Court of Appeals.

plaintiffs would probably have obtained more business if they could have purchased Flintkote tile on a direct basis, and that no showing is made of the existence or availability of such business or plaintiffs' ability to undertake additional work. We know only that business was 'very competitive' and that petitioners *encountered difficulty in disposing of the one and one-half carloads of Flintkote tile which had been supplied them. Financially plaintiffs went into business with a relatively small capital investment ($6,000) with hopes of increasing their capital account by ploughing profits back into the picture.*" (Emphasis added.) The foregoing is quoted from the opinion to illustrate the court's apparently negative and hypercritical attitude in its consideration of the case. The undisputed facts in this connection are: (1) That the profit made by petitioners in the years, 1952, 1953, and 1954, were the result of their being without a source of supply of tile and hence being unable to deal with the general contractors they had successfully dealt with in the past and with which they were equipped and accustomed to deal, and the fact that for lack of such supply petitioners were relegated to insignificant small installations requiring only small quantities of tile which could be obtained from "bootleg" sources at enhanced and non-competitive prices or from non-acoustic activities. (2) Regarding petitioners' "difficulty in disposing of the one and one-half carloads of Flintkote tile which had been supplied" the fact is as the record shows that on February 19, 1952, when petitioners were notified by Flintkote they could purchase no more acoustical tile petitioners had *at the time* already sold, under executed contracts, the one and one-half carloads mentioned by the court. This latter fact was the sole reason for Flintkote's supplying petitioners with the extra half carload of tile. [R. 954.] This portion of the opinion is a mere unsupported paraphrasing of the brief

of appellants below which in turn was unsupported by *any* factual reference. (3) Exhibits 1 and 44, as well as the oral testimony [R. 713-714] show without dispute that plaintiffs presented a financial statement to Flintkote as a condition precedent to their approval by Flintkote which showed total pledged assets in excess of $50,000. The $6,000 mentioned by the court was merely an out of pocket expenditure in payment of the original carload of tile in December, 1951, prior to the time defendants were completely organized to do business and at which time petitioner Lysfjord was in fact still assisting the Downer Company in the final execution of contracts which he had obtained while he was associated with that company. The record shows that Lysfjord continued his association with Downer Company for this purpose until after petitioners' supply of tile had been terminated on February 19, 1952. [R. 487, App. B, p. 62, *infra*.] (4) The court here obviously utilized the damage resulting from Flintkote's termination of petitioners' source of supply *against petitioners* for the purpose of discrediting petitioners' opinions based upon many years of contacts, experience, and sales productivity. Obviously with nothing to sell petitioners were, *during the period utilized by the court*, disabled from successfully performing as they admittedly had performed for many years prior thereto. The court also apparently seeks here to turn against petitioners the fact that they attempted to remain in business rather than closing their doors entirely.

From the foregoing evaluation of fragmentary evidence and facts, the court finally concludes that the petitioners' estimates of lost profits were the result only of the opinion of "inexperienced witnesses" amounting to no more than "fervent hopes"—again an unsupported paraphrase of Flintkote's brief below. Here the court ignored the fact that Flintkote through Ragland verified the uncontradicted

past sales accomplishments and established productivity of petitioners [R. 829-830], and that petitioners' qualifications were endorsed by Flintkote's own witnesses. For the convenience of the court a portion only of the uncontradicted evidence pertaining to petitioners' qualifications, in addition to that previously cited, is quoted in Appendix C, pages 82-92, *infra* with record citations.

Time Covered by Damages Due to Loss of Profits.

The Circuit Court of Appeals [R. 1313, App. A, pp. 52-53, *infra*] inferred and, it is respectfully submitted, contrary to the evidence, the instructions[9] and the jury's verdict, that the termination of plaintiffs' supply of acoustical tile was in fact not a termination at all but was apparently a *series of refusals to deal* wholly disassociated from the very purpose of the act as found by the jury under explicit instruction from the trial court, namely to destroy petitioner's business. All of the evidence, including the admissions of the defendant's counsel during the course of the trial would also seem to militate against any such inference by the Circuit Court of Appeals.[10] [R. 487, 662, 774 *et seq.*, 945, 952, 962, 982, 984-986.]

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[9]In its instructions the court told the jury:

"Bear in mind, if you find damages, *that the damages would be limited to compensation for injury to plaintiffs' business arising from the acts of the defendant*, providing such injury was the natural and proximate result of the acts." [R. 1253—emphasis added.] The jury was, therefore, instructed in accordance with the theory of the entire trial; namely, that a single overt act caused all of the damage to the plaintiffs and that the measure of damage should be based only upon this act of the defendant Flintkote.

[10]The Pertinent evidence (in part) is quoted verbatim in the (Appendix D, pp. 93-97, *infra*) with record references. Here the court obviously confused conspiracy with cause of damage. Under this decision it would seem that the mere fact that petitioners continued a limited operation under disability to compete rather than close their doors, has been used to deprive them of damages which would otherwise be available to them. The full import of the Circuit

It is to be noted in connection with this portion of the court's decision that appellees' position has been either misconstrued or misunderstood. Thus, the appellees below contended that the act of termination was the direct cause of plaintiffs' damage—not that this was the only overt act of Flintkote.[11] Other acts are contained in the appendices (B, C, and D) herein, including the repeated meetings of officers and agents of the defendant Flintkote and the petitioners' competitors for the purpose and with the ultimate effect of destroying petitioners' acoustical tile business. Appellees at no time contended there was a continuing refusal in any respect. It was in fact appellant below that urged the Circuit Court of Appeals to convert Flintkote's purposeful destruction of appellees' business into a series of refusals, by implication and without factual support.

The fallacy of this reasoning seems clear since it ignores the fact that the evidence, the instructions, and the jury's verdict held that the sole purpose of Flintkote's act in terminating petitioners' only source of supply of acoustical tile was to *eliminate* the petitioners' competition in the industry—not day to day, but permanently. To presume

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Court's opinion here seems clear if it is applied to a situation in which petitioners had merely ceased doing business altogether when their supply was taken from them, as under the law they were entitled to do. *Kobe v. Dempsey Pump Co., et al.*, 198 F. 2d 416, *cert. den.* 75 S. Ct. 46; *Twentieth Century-Fox Films Corp., et al. v. Brookside Theatre Corp.*, 194 F. 2d 846.

[11]The quotations from appellees' brief in the Court of Appeals' decision were used out of context. Thus, the quotation used by the court below from Appellees' Brief to the effect that "appellees at the time of trial * * * were still under the competitive limitations resulting from the conspiracy" [R. 1313, App. A, p. 53 *infra*] was an isolated excerpt which related *solely* to a reply to a statement by appellants below that plaintiffs' estimate of loss of profits was contrary to the profits actually made by plaintiffs during a period plaintiffs had no source of competitive tile with which to compete.

otherwise, it is respectfully submitted, is obviously to ignore the evidence as a whole and the basic purpose of Flintkote's participation in the conspiracy. [R. 239, 240, 257-258, 487, 953, 954, 955, 993, 995, 999, 1057, 1071, 1072, 1096, 1097, App. D, pp. 93 *et seq., infra.*]

This portion of the court's holding is not only contrary to all of the evidence, but is undoubtedly contrary to the position taken by Flintkote's counsel throughout the trial. At the very commencement of the trial [R. 184] counsel for defendant Flintkote stated to the jury:

> "Later, after the arrangement started, it is the position of the defendant Flintkote Company it came to its knowledge and information that contrary to this expressed understanding the plaintiffs were actively operating in the Los Angeles metropolitan area.[12]
>
> "After discussing the matter in the Flintkote circles, it was decided that in that situation there was nothing to do but to terminate this relationship. That was thereupon done, and that was the reason why it was done, solely as a matter of the business judgment and policy of The Flintkote Company."

Questions Presented.

1. Whether the decision of the court of appeals upon evidentiary questions amounted to an usurpation of the statutory right of trial by jury in treble damage actions.

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[12]The jury's verdict and the decision of the Circuit Court of Appeals makes this reference to an alleged breach of contract irrelevant at this time.

Moreover, the evidence as to the singleness of the purpose and act of Flintkote in terminating petitioners' source of supply is without contradiction in the evidence as is shown by the above record reference.

2. Whether or not the Circuit Court of Appeals' ruling on the question of the admission of certain alleged hearsay evidence and its effect in this case was erroneous and in conflict with the applicable legal principles governing trial and appellate procedures.

3. Whether the Court of Appeals' ruling on jury instructions, other than those relating to damages, was erroneous and contrary to public policy and to legal and appellate principles in this and other circuits where, as here, no objection was made to the instruction and where counsel offered no suggestion as to change or clarification in the charge forming the basis of the decision even though the trial court twice expressly invited counsel to do so.

4. Whether or not the appellate court applied a special and erroneous rule of damage to the undisputed evidence, and if so, whether such rule is contrary to the decisions and law enunciated by the Supreme Court and by other appellate courts in similar cases, and whether or not such rule operates to discourage and render ineffective the private enforcement policy of the treble damage provisions of the Sherman Act.

5. Whether or not the Circuit Court of Appeals could legally ignore all of the undisputed evidence relating to the measure of damage resulting from lost profits accruing from Flintkote's act of termination as found by the jury, and reverse the judgment for plaintiff on the ground that the court would nevertheless imply that Flintkote's act of termination was not for the purpose of permanently eliminating petitioners' competition or to perpetuate the price-fixing monopoly of Flintkote's co-conspirators as the jury found and as shown by such undisputed evidence.

6. Whether or not the Circuit Court of Appeals could legally reverse the verdict of the jury and the judgment for petitioners with respect to damages arising out of lost profits *because in the opinion of that court* the petitioners were not sufficiently qualified to offer opinion evidence as to the amount of such damage under the circumstances of this case where the undisputed record shows: (1) that Flintkote's own witnesses testified that petitioners were experienced and qualified to engage in the business, and that because of such qualification and past experience Flintkote wanted petitioners "on its team;" (2) that though the measure of damages from lost profits as testified to by petitioners, as well as petitioners' qualifications, were never seriously challenged throughout the trial even though respondent Flintkote called as its own witnesses a representative of each and every other co-conspirator in the case and failed to examine such witnesses for purpose of rebutting petitioners' qualifications or their testimony regarding the measure of damage resulting from Flintkote's overt act in furtherance of the price fixing conspiracy charged and found in the case, and (3) that the Circuit Court of Appeals decision on this point confused the admissibility of petitioners' opinions with the weight of the testimony.

7. Whether or not the decision of the Circuit Court of Appeals in this case amounts to a special and novel application of the substantive and procedural law to a treble damage action, contrary to the public interest involved in such actions, in derogation of such policy, and contrary to the application of the same substantive and procedural law as it is applied in other types of civil and criminal cases by the same Circuit Court of Appeals.

8. Whether or not the fact that petitioners attempted to continue their business after having their only source

of acoustical tile terminated for the purposes charged and found herein may legally deprive them of damages proximately caused by such act of termination if, as found by the jury, such damage continued beyond the date of the overt act and purpose of the conspiracy resulting in the damage.

9. Whether or not there are substantial clearcut issues of law respecting the Circuit Court's ruling in this case which are fundamental to the further conduct of the case and which would otherwise qualify as a basis for *certiorari* involving the public policy enunciated in the Sherman Act and whether or not a re-trial of the case would result only in furthering the crippling effects of this decision in the future enforcement of the Sherman Act through treble damage actions.

Reasons for Granting the Writ.

The Circuit Court of Appeals has, by its decision in the present case, applied both substantive and procedural law in a manner so as to set an erroneous precedent constituting the law of the case which will reach beyond the immediate action and which is "fundamental to the further conduct of this case." *United States v. General Motors Corp.*, 323 U. S. 373, 65 S. Ct. 357. For this reason the decision is final insofar as it affects the public interest and policy of future enforcement of the antitrust laws by treble damage actions and is likewise final as to its effect upon a re-trial of this case. A re-trial could result only in compounding and perpetuating the same errors here and in the trial and appeals of other future cases in this circuit as will be urged herein.

I.

The Circuit Court of Appeals' decision as it affects the question of conspiracy, if allowed to stand, constitutes an invasion of petitioners' right of trial by jury and amounts to a granting of a trial *de novo* by the appellate court, contrary to established legal precedent in this circuit in other types of cases, in other circuits, and in decisions of the Supreme Court of the United States.

The Circuit Court of Appeals in its decision [R. 1280, App. A, p. 10, *infra*] recognized the very rule which it violated—"The verdict of a jury will be sustained if there is substantial evidence, properly before the jury, to support it." As pointed out in the Statement herein, the court also held there was such evidence. Its opinion, therefore, is tantamount to a holding, in the circumstances of this case, that any degree of hearsay evidence wrongfully admitted may in the discretion of the appellate court be treated as prejudicial error and form the basis for reversal of a jury verdict even though it is merely cumulative of evidence introduced by other witnesses, including defendant's own witnesses; even though its effect went only to an indirect facet of the main question involved; and even though the substance of the objectionable testimony was admitted by defendant's counsel, affirmed by defense witnesses throughout the trial, and was in fact affirmatively introduced through defendant's own witnesses. The Statement here shows (1) that the Krause statement was admittedly stricken from the record and, therefore, not before the court, and (2) that the Baymiller statement was in no wise objected to at the trial of the case and was duplicated throughout the record by defendant's own witnesses. (App. B., *infra*.)

Even though it be assumed, that all three conversations branded by the Circuit Court of Appeals as hearsay, were in fact such, nevertheless the decision constitutes manifest error in accordance with the prior decisions of the Ninth Circuit, the Supreme Court of the United States, and other circuit courts of appeal. The basic rule in such matters which should have governed the Circuit Court of Appeal's action under the record in this case is clear and has been uniformly applied in the Ninth Circuit in cases other than treble damage actions, and in other circuits in all cases:

> "It is well settled that, if there is any substantial evidence to which the jury may properly give credence and which, viewed in its most favorable aspect, would sustain a verdict favorable to the plaintiff, then the court is not authorized to enter an order of dismissal or to direct the jury to return a verdict for defendant."

(United States v. Hartley (9th C. C. A.), 99 F. 2d 923 at 925. To the same effect see *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons* (7th C. C. A.), 340 U. S. 211, 71 S. Ct. 259; *Cf: Marino v. United States* (9th C. C. A.), 91 F. 2d 691, 699; *Interstate Circuit v. United States*, 306 U. S. 208, 59 S. Ct. 467; *United States v. Spadafara* (9th C. C. A.), 181 F. 2d 1955, cert. den. 71 S. Ct. 233; *Nye & Nissen v. United States* (9th C. C. A.), 168 F. 2d 846, affirmed 69 S. Ct. 766; an erroneous and contrary application of the law to a treble damage action would seem obviously to defeat the public interest. *Lawlor v. National Screen Service Corp.*, 349 U. S. 322, 75 S. Ct. 865; *United States v. Johnson*, 327 U. S. 106, 66 S. Ct. 464; *United States v. Sommers*, 327 U. S. 106, 66 S. Ct. 464; *McGurty v. Transcontinental and Western Air, Inc.* (7th C. C. A., 1948), 167 F. 2d 406; *Myers v. Reading Co.*, 331 U. S. 447, 67 S. Ct. 1334;

Ellis v. Union Pacific R. Co., 329 U. S. 649, 67 S. Ct. 598; *Lavender v. Kurn*, 327 U. S. 645, 66 S. Ct. 740; *State of Washington v. United States* (9th C. C. A.), 214 F. 2d 33; *United States v. Burke* (9th C. A. A.), 50 F. 2d 653 at 656; *Henwood v. Chaney* (8th C. C. A.), 156 F. 2d 392.)

The decision of the Circuit Court of Appeals as a whole runs counter to the axiomatic principle that an appellate court may not reverse a jury verdict on the ground that inadmissible evidence had been received if there is any other evidence to support the verdict, and especially where there is other evidence coming from defendant's own witnesses, as here. (*Henwood v. Chaney*, 156 F. 2d 392; *Lavender v. Kurn*, 327 U. S. 645, 66 S. Ct. 740.) It is only "where there is a complete absence of probative facts to support the conclusion reached does a reversible error appear." (*Myers v. Reading Co.*, 331 U. S. 477, 67 S. Ct. 1334; *Ellis v. Union Pac. R. Co.*, 329 U. S. 649, 67 S. Ct. 598.)

While it is clear that the "hearsay" evidence constituting the basis of the Circuit Court of Appeals' decision could not have been prejudicial, it is respectfully urged that neither is it hearsay in this type of case, and further, the rejection or admission of this *minutia* of evidence was within the discretion of the trial court. (*International Indemnity Co. v. Lehman*, 28 F. 2d 1 (cert. den. 49 S. Ct. 83); *Reeder v. United States*, 262 Fed. 36; *Khuie v. United States*, 159 U. S. 590; *Kotteakos v. United States*, 328 U. S. 750, 66 S. Ct. 1239.)

Finally, under the circumstances of this case, any hearsay which may have been admitted regarding complaints of petitioners' competitors was waived by the affirmative introduction of the same type of evidence by defendants. (*Hanson v. Boyd*, 161 U. S. 397, 16 S. Ct. 571; *Boulter v. Commercial Standard Ins. Co.*, 175 F. 2d 763; *Novick*

v. Gouldsberry (C. C. A. 9th), 173 F. 2d 496; *Baldwin v. United States* (9th C. C. A.), 72 F. 2d 810; *McCabe & Steen Construction Company v. Wilson*, 209 U. S. 275, 28 S. Ct. 558.).

It is respectfully submitted that the treatment accorded the jury's verdict with respect to its holding on conspiracy is in direct conflict with the applicable principles applied in the cases cited herein.

II.

The decision of the Circuit Court of Appeals reversing the jury verdict in favor of petitioners because of instructions (other than those given on the question of damages) has been shown to be clearly erroneous in the "Statement" herein. The decision in this respect is likewise contrary to the application of the law in the Ninth Circuit in other types of cases and to the law as applied generally throughout the federal courts, is contrary to the uniform application of the Rules of Civil Procedure, and it is submitted, amounts to a novel and discriminatory application of the substantive and procedural law in derogation of the administration of the antitrust laws and the public policy relating to the enforcement of said laws. (Federal Rules of Civil Procedure, Rule 51 (28 U. S. C. A. following Sec. 728); Local Rule District Court, Southern District of California No. 14 and Rule 20 2(d) of the Rules of the Ninth Circuit Court of Appeals to the same effect as Rule 51, *supra*; *State Farm Mutual Auto Ins. Co. v. Porter* (9th C. C. A.), 186 F. 2d 834; *Las Vegas Merchants Plumbers Ass'n v. United States* (C. C. A. 9th), 210 F. 2d 732; *Palmer, et al. v. Hoffman*, 318 U. S. 109; *First Nat'l Pictures v. Robison* (9th C. C. A.), 72 F. 2d 37.). This court will note the limitation of Judge Albert Lee Stephens' concurring comments at the end of the Opinion. [R. 1319, App. A. p. 61, *infra*.]

III.

The decision of the Circuit Court of Appeals as it related to the measure of damages purports to be based upon the court's appellate power to review the verdict of the jury if it finds the verdict was "grossly excessive or monstrous." [R. 1303, *et seq.*, App. A, p. 40, *et seq.*, *infra.*] We submit that the Circuit Court actually found neither element in deciding the instant case—as is demonstrated in the "Statement" herein.

Overall, the Circuit Court of Appeals' decision is obviously based upon its own evaluation of the *weight* of petitioners' opinion on the question of the measure of damages resulting from lost profits rather than upon the *admissibility* of such evidence. The decision is erroneous and also ignores basic legal principles and the discretionary powers and duties of the trial court in admitting opinion evidence[13] for this purpose. The decision in this respect further places an extra and unconscionable burden upon the plaintiff in a treble damage action since under the ruling here a permanent termination of a source of supply with which to conduct one's business could result in no appreciable damage unless the injured party ceased altogether to engage in the business. (*New York, L. E. & W. R. Co. v. Estill*, 147 U. S. 591; *St. Louis Southwestern Ry. Co. v. Ferguson*, 182 F. 2d 949; *Thornwalt v. Reading Co.*, 79 Fed. Supp. 921; *Peary v. Edmonds*, 116 U. S. 550, 6 S. Ct. 501; *Tenant v. Peoria & P. U. Ry. Co.*, 321 U. S. 29, 64 S. Ct. 409; *20th Century-Fox Film Corp. v. Brookside Theatre Corp.*, 194 F. 2d 846, 854-855, 343 U. S. 942, 72 S. Ct. 1035; *Aladdin Mfg. Co. v. Mantle Lamp Co. of America*, 116 F. 2d 708, 716-717; *Allison v. Chandler*, 11 Mich. 542; *Chapman v. Kirby*, 49 Ill. 221 (cited and approved in *Wein-*

[13] In the instant case no objection was raised to such testimony on this ground and the testimony of defendant's own witnesses confirmed in all respects the expert qualifications of petitioners in the acoustical tile field. (App. C, pp. 82-92, *infra.*)

man v. de Palma, 232 U. S. 571); *Sinclair Refining Co. v. Jenkins Petroleum Process Co.*, 289 U. S. 689; *Eastman Kodak Co. v. Southern Photo Co.*, 273 U. S. 359; *William R. Rankin Co. v. Associated Billposters, etc.*, 42 F. 2d 152; *Sheldon v. Moredall Realty Co.*, 29 Fed. Supp. 729, 732; *Speegle v. Board of Fire Underwriters*, 29 Cal. 34, 46; *Bigelow v. RKO Radio Pictures, Inc., et al.*, 327 U. S. 251, 66 S. Ct. 574; *Bordonaro Bros. Theatre v. Paramount Pictures, et al.*, 176 F. 2d 594; *Kobe, Inc. v. Dempsey Pump Co., et al.*, 198 F. 2d 416 (cert. den. 73 S. Ct. 46); *Lawlor v. Loewe*, 235 U. S. 522, 35 S. Ct. 170, 59 L. Ed. 341.) The decision of the Ninth Circuit Court of Appeals seems clearly to be in direct conflict with the foregoing decisions.

The general principles involved here are clear with respect to the qualifications of petitioners to offer their opinion on the question of the measure of damages resulting from lost profits. "It is only when opinion evidence is entirely without support in the demonstration and physical facts that such evidence is not substantial." (*Washington v. United States* (9th C. C. A.), 214 F. 2d 33.) "Competency and qualifications of one offered as an expert witness, and the extent to which his opinion may be required, are matters addressed largely to the judicial discretion of the trial judge." (*Reuter v. East Airlines*, 226 F. 2d 443; *Schille v. Atchison*, 222 F. 2d 810.) As held in *Union Trust Company of Cleveland, Ohio, et al. v. Woodrow Mfg. Co., et al.*, 2 Fed. Supp. 602, the practical rule applied by most courts seems to be that "while witnesses are not required to be expert or skilled in the strict and severe sense of the term in order to give opinion on value, and while there is no inflexible rule defining how much a witness must know in order to be so qualified, it must be made to appear that he has had, and utilized, means superior to those available to the jurors, for forming an intelligent opinion. See to the same effect: *Gila Valley G. & N. R. Co. v.*

Lyon, 203 U. S. 465; *Morton Butler Timber Co. v. United States*, 91 F. 2d 884, *Wheeler v. United States*, 159 U. S. 523, 16 S. Ct. 93."

In any event it would seem that here, where the trial judge had the opportunity of passing upon petitioners' qualifications as experts in view of all of the evidence and facts in the case, and where, as here, the defendant did not challenge or attempt to repudiate such qualifications, the question of petitioners' qualifications went not to admissibility, but only to the weight of their testimony which was argued to and weighed by the jury during the trial of the case. (*Firemen's Fund Ins. Co. v. Collins*, 220 F. 2d 150.)

As has been demonstrated in the Statement herein, all of the evidence in the record refutes the *inference* of the Circuit Court of Appeals to the effect that the final termination of plaintiffs' source of supply was not final at all, but constituted repeated refusals to sell. This conclusion ignores the purpose of the termination as found by the jury under the instructions of the trial judge. It is respectfully submitted that the cases cited by the Circuit Court of Appeals to sustain its decision in this respect are inapplicable.

In the limited confines of a petition for certiorari it is impossible to delineate or point up to this Court all of the details which petitioners believe to be erroneous. We have, therefore, confined ourselves to a reference to only so much of such detail as might *illustrate* the basis of the appellate court's error and the importance of the federal questions involved as a result of the decision.

It is respectfully submitted that a Writ of Certiorari should be granted herein.

ALFRED C. ACKERSON,
Attorney for Petitioners, Elmer Lysfjord and Walter R. Waldron, Doing Business as aabeta Co.

APPENDIX A.

Opinion of The United States Court of Appeals for the Ninth Circuit.

The Flintkote Company, a Corporation, Appellant, v. Elmer Lysfjord and Walter R. Waldron, Doing business as Aabeta Co., Appellees.

No. 15,005. Mar. 29, 1957.

Appeal from the United States District Court for the Southern District of California, Central Division.

Before Stephens, Barnes and Hamley, Circuit Judges.

BARNES, *Circuit Judge:*

Appellees as plaintiffs on July 21, 1952, filed a complaint under the Sherman Antitrust Act[1] against the Acoustical Contractors Association of Southern California, Inc., and certain members thereof, (six individuals, and eight corporations, individuals, or partnerships doing business under a fictitious firm name). The Flintkote Company and four John Does were also joined as defendants. The essential interstate commerce was alleged to have been in acoustical tile.

To understand this case, it is first necessary to look at the pleadings. All defendants, other than Flintkote, were charged with violating the law in the following particulars:

> "For some time prior to the date of the filing of this complaint and continuously since prior to January 1, 1951, the defendants herein, with exception of Flintkote, well-knowing all of the foregoing facts

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[1]Title 15, U.S.C.A., §1, et seq. (Secs. 1, 2 and 7 of Sherman Act, Secs. 4, 5, 12 and 16 of Clayton Act.) 26 Stat. 209; 50 Stat. 693.

have been engaged in a combination and conspiracy to restrain and to monopolize trade and commerce in acoustical tile in violation of . . ."

the Sherman Act. The general plan and purpose was:

"1. To maintain and adhere to non-competitive prices . . .

2. To refrain from competing with each other . . .

3. To allocate the sale and installation of acoustical tile among members of the defendant, The Association, . . .

4. To exclude non-member acoustical tile contractors from their legal right to compete in the purchase, sale, and installation of acoustical tile in Los Angeles and surrounding areas by use of the following means among others:

(a) By boycotting, threatening to boycott, and otherwise coercing manufacturers . . .

(b) By concertedly entering inordinately low bids for jobs . . ." [Tr. 10, 11]

It was then alleged that plaintiff entered into an agreement shortly prior to January 1, 1952, to buy from Flintkote "a continuous supply of a complete line of acoustical tile;" and that:

"In or about March 1952, and solely because of the active and successful competition of plaintiffs with members of the defendant, The Association, and the effect of such competition on the illegal, non-competitive price fixing policies and activities of said members, the defendant Flintkote was induced to terminate its agreement to supply plaintiffs with acoustical tile products by reason and because of the

concerted action and coercion exerted upon said defendant by members of the defendant, The Association, in the form of threats to boycott Flintkote products in the Los Angeles area and elsewhere in the State of California by said defendants in the event Flintkote continued supplying said products to plaintiffs." [Tr. 13, 14]

A First Amended Complaint was lodged January 28, 1953, and filed March 23, 1953, by appellees. Plaintiffs' theory of their case was changed to directly charge the defendant Flintkote Company, with agreeing to sell acoustical tile to plaintiffs in the latter part of 1951, and that "all defendants" from an unknown date "prior to the year 1951, and continuously thereafter to date of filing the complaint" conspired to restrain and have restrained trade and commerce, in violation of Sections 1 and 2 of the Sherman Act. Thus, the amended complaint charges Flintkote with being a member of the conspiracy.

In their original complaint, plaintiffs asked for $75,000 damages; that any award be trebled, for costs of suit and attorney's fees; and that defendants be enjoined from continuing any of the alleged unlawful practices.

In their amended complaint, plaintiffs asked for $100,000 damages, without any prayer for trebling the same; for costs of suit and attorney's fees; that defendants be enjoined from continuing any of the alleged unlawful practices; that the defendant Flintkote be enjoined from any agreement with other defendants to refuse to sell to plaintiffs, or in any way agreeing with other defendants to perpetuate or assist in perpetuating the alleged conspiracies, their purposes or objects; and

that Flintkote finally, be required to ". . . . continue said contract and agreement so long as there exists no reason under sound business principles and practices for terminating the same."

Flintkote, answering the Amended Complaint, asserted with care and verbosity common to pleadings, a general denial; alleged it had not participated in any conspiracy in restraint of trade, or to create or maintain a monopoly; set forth that it sold tile to three of the defendant's contractors, and had at times sold to three others and to plaintiffs; admitted several sales of acoustical tile to plaintiffs; alleged it made no contract with plaintiffs of any kind, nor any contract to supply plaintiffs, either on any continuing basis, or any basis, or at all.

As a first and separate defense, Flintkote alleged that it sold one carload lot to plaintiffs for resale in the San Bernardino-Riverside area, (as distinguished from the Los Angeles area); that said sale was conditioned upon an understanding that plaintiffs would use the tile so sold in the San Bernardino-Riverside area, and not engage in the contracting business in the Los Angeles metropolitan area; that when plaintiffs breached said condition of sale, and contracted for installations in the Los Angeles Metropolitan area, the defendant Flintkote Company refused to sell plaintiffs further tile.

This answer was filed on June 26, 1953. On July 31, 1953, a stipulation and order was entered dismissing the cause of action as to all named defendants except Flintkote. On May 4, 1955, the jury trial commenced. At the start of the trial, it was brought to the court's attention that $20,000 had been paid to the plaintiffs in exchange for a covenant not to sue, running in favor of

all defendants except Flintkote. It was stipulated that the court could advise the jury

> "that a settlement of the action had been made as between the plaintiff and all defendants except the defendant Flintkote, but the Court shall not state the monetary consideration, keeping that away from the attention of the jury."

Because of this settlement, some of the jury instructions requested by plaintiffs and filed by them on April 29, 1955, in their reference to defendants, were not accurate. Before the jury was empanelled, counsel for defendant called to the court's and opposing counsel's attention "that it would be almost imperative that plaintifs' instructions be recast," [Tr. 155] "because in some instances we even have a situation where you tell the jury that they could find against some but not all the defendants . . .".

It was further agreed by court and counsel, before trial, that because there were both legal and equitable issues in the case, the "first were to be handled by the jury and the latter by the judge." [Tr. 158 to 161, incl.] The record does not disclose that any action, affirmative or negative, was taken on the demand for injunctive relief.

Flintkote Company now appeals from a judgment against it, based on a jury verdict for $50,000, trebled by the court to $150,000, plus $25,000 attorney's fees, plus $165.70 costs, minus the $20,000 received by plaintiff-appellees from certain original parties defendant, other than appellant, or a total judgment of $155,165.70.

Appellant urges fifteen grounds for reversal.

We believe we can best discuss these fifteen alleged errors by grouping them as follows:

First: The sufficiency of the evidence, (particularly as to *knowledge* by the defendant of the conspiracy, and its participation therein) to support a verdict of violation of the Antitrust Laws.

Second: Alleged errors in admission of evidence.

Third: Alleged errors in instructions, other than damages.

Fourth: Alleged error in refusing to grant a new trial, in instructions respecting damages, in the fixing of attorney's fees, and in the method of crediting the $20,000 payment.

First: The Sufficiency of the Evidence

Was there any substantial evidence properly before the jury from which it could reasonably draw the conclusion on an issue of fact, that defendant Flintkote had violated the Antitrust Laws?

Defendant maintained its refusal to deal with plaintiff was a legitimate business decision; that it had no part in the alleged conspiracy among the original "Association defendants" to restrain trade. Hence it is urged, the Flintkote refusal to sell cannot be *participation* in a conspiracy, and Flintkote having no *knowledge* that such a conspiracy existed, could much less have *knowingly participated* therein.

"The requirement is dual," says appellant, "it requires both knowledge and participation, and neither is sufficient without the other," relying on United States v.

Falcone, 311 U. S. 205, 61 S. Ct. 204 (1910), where the court said at page 210:

> "The gist of the offense of conspiracy . . . is agreement among the conspirators to commit an offense attended by an act of one or more of the conspirators to effect the object of the conspiracy. [Citing cases] Those having no knowledge of the conspiracy are not conspirators, [citing cases]; and one who without more furnishes supplies to an illicit distiller is not guilty of conspiracy even though his sale may have furthered the object of a conspiracy to which the distiller was a party but of which the supplier had no knowledge.";

and on Weniger v. United States, 47 F. 2d 692 at 693 (9 Cir.) where this Court said:

> "The failure of a person to prevent the carrying out of a conspiracy, even though he has the power so to do, will not make him guilty of the offense without further proof that he has in some affirmative way consented to be a party thereto. Neither will the commission of an overt act, though unlawful in itself, be enough to show that the actor was a party to the conspiracy. The law requires proof of the common and unlawful design and the knowing participation therein of the persons charged as conspirators before a conviction is justified."

We should first recognize that the cases cited by appellant correctly state the law. We must also agree that on the question of Flintkote's knowledge as to whether the admitted conspiracy did or did not exist, all *direct* evidence is that the officers and employees of Flintkote

did *not* know. This is the unvarying testimony of all defendant's employees.

But the problem is not that simply solved. Neither knowledge of the conspiracy alleged, nor participation therein, need be proved by *direct* evidence, even in criminal prosecutions where the rule of proof is more strict than in civil conspiracy cases, United States v. Univis Lens Co. 66 Fed. Supp. 809, 813. As noted by the Supreme Court in Paoli v. United States, 352 U. S. 232, 25 L. W. 4077, 4078, note 4, decided January 14, 1957,

> "Participation in a criminal conspiracy may be shown by circumstantial as well as direct evidence. See, e.g., Blumenthal v. United States, 332 U. S. 539, 557; Glasser v. United States, 315 U. S. 60, 80; Direct Sales Co. v. United States, 319 U. S. 703; United States v. Manton, 107 F. 2d 834, 839."

It is likewise true that:

> "A conviction resting solely upon circumstantial evidence is not an innovation. It is, we think, well established that the proof and evidence in an anti-trust conspiracy case is, in most cases, circumstantial. Proof of a formal agreement is unnecessary, and were the law otherwise such conspiracies would flourish; profit, rather than punishment, would be the reward. See American Tobacco Co. v. U. S., 6 Cir. 147 F. 2d 93, affirmed 328 U. S. 781, 66 S. Ct. 1125, 90 L. Ed. 1575."
>
> [C-O-Two Fire Equipment Co. v. United States, 9 Cir. 197 F. 2d 489 at 494.]

And see cases cited: Wharton's Criminal Evidence, §179, p. 354, Note 20. Here the evidence before the

jury showed the existence and operation of an allocation arrangement, by which acoustical jobs were assigned in rough rotation to one or another of the accoustical contractors who were members of the Acoustical Contractor's Association. There was evidence that bidders were told what to bid, not based upon what the cost of the job was, but to enable a certain contractor to get the job. Considerable time was spent in introducing and interpreting the contractor's "take off sheets,"[1a] and what they meant to the workings of the conspiracy. Complimentary bidding by members of the group, other than the one designated to get the job, was engaged in. In fact, both plaintiffs had at one time worked for an employer engaged in such a conspiracy, and plaintiff Lysfjord had protested to his employer his inability to *compete* for installation jobs because of such conspiracy. There was no direct evidence that Flintkote, as a seller of tile and not an installer, participated directly in that original conspiracy between the dealers, but there was evidence from which an inference might have been drawn by the trier of fact warranting the belief that the defendant Flintkote, through acting as supplier to the conspirators on some of the jobs, could have acquired knowledge of the conspiracy; and there was evidence which warranted the conclusion that Flintkote, with such inferred knowledge, participated in the conspiracy, and aided it by its refusal to sell to plaintiffs. If that refusal was not the result of the exercise of ordinary business judgment, but the result of threats

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[1a] "Take off sheets" may be defined in the acoustical tile trade as referring to written estimates of the amount of acoustical tile required for a particular project. The contractor with the lowest figure on his take-off sheet would be dropped from the bidding list and the contractor with the next lowest estimate would be instructed to take the job. [Tr. 304, 494].

made and pressure applied by members of the known conspiracy to and against Flintkote, the act of refusing to sell would constitute knowing participation. Because one is coerced by economic threats to participate in or aid and abet an illegal scheme does not excuse the actor.[2]

There was before the jury substantial inferential evidence that Flintkote had knowledge of the conspiracy, and joined it and had acted in furtherance of it, when we view the evidence in the light most favorable to the plaintiffs. The verdict of a jury will be sustained if there is substantial evidence, properly before the jury, to support it. Glasser v. United States, (1942) 315 U. S. 60, 69; Woodard Laboratories v. United States, 9 Cir., 198 F. 2d 995; Las Vegas Merchants Plumbers v. United States, 9 Cir., 210 F. 2d 732, 742.

Appellant, relying primarily on Johnson v. J. H. Yost Lumber Co., 117 F. 2d 53, 61-2, urges that the facts of threats (assuming there were threats), will not support an inference of knowledge of a conspiracy. Such a broad statement is too general and sweeping. Proof of the fact of threats might infer knowledge, or it might not, depending on the nature of the threats, their number, their frequency, and more directly and importantly, their content and what they disclosed, directly or by inference, to the defendant Flintkote, viewed in the then existing factual situation under which they were made and received.

Where there has been proof (a) that a conspiring group of tile dealers disclosed to a supplier, directly or by inference, an accomplished unlawful purpose and intent

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[2]United States v. Paramount Pictures, et al., 66 Fed.Supp. 323, 352; approved, 334 U.S. 131; 161, 68 S.Ct. 915, 92 L.Ed. 1260.

to boycott non-participating dealers, (and hence disclosed the existence of a conspiracy) and (b) thereafter one or more dealers had threatened the supplier on numerous occasions that they intended jointly and severally to refuse to buy from the supplier if the supplier continued to sell acoustical tile to plaintiffs, and (c) if the supplier, having been selling to non-conspirators, thereafter refused to sell to non-conspiring dealers because of the threats, it could never be maintained, as a matter of law, that such decision not to sell was a lawful exercise of the supplier's business judgment.

It is true that one engaged in private enterprise may select his own customers, and in the absence of an illegal agreement, may sell or refuse to sell to a customer for good cause, or for no cause whatever. But it is not for the seller to finally decide that it was for a good business reason, or no reason, that he refused to deal. That decision, placed in its proper perspective of circumstances and facts known to the seller, must be judged by the trier of facts, to determine if it was an innocent and lawful exercise of the seller's private right, or an act which showed knowing participation in an unlawful conspiracy.

Were it otherwise, there could never be a civil judgment nor any criminal conviction against any manufacturer of products flowing in interstate commerce. He could merely state—"despite my knowledge of a conspiracy which existed, which I knew to be unlawful, I'm innocent and cannot be held liable because I say I exercised my business judgment, and I can refuse to sell to anyone, and that is lawful, no matter what the circumstances may be."

Our conclusion in this matter does no violence to the Yost case. There the court says:

> "From the *mere fact* of refusing to sell to plaintiffs, there can therefore arise no inference of an unlawful agreement, because one may lawfully select his own customers. (cases cited) There must be *substantial evidence furnishing some basis* from which the alleged fact of such an agreement may *reasonably be inferred*. A fraudulent conspiracy may be shown by circumstantial evidence, but the facts and circumstances relied upon must attain the dignity of substantial evidence and not be such as merely to create a suspicion. Here, it appears that a number of these defendants had already refused to sell the plaintiffs, even before the date of the alleged conspiracy. Others thought it had business to sell them; and as plaintiffs themselves alleged, these defendants were coerced. Where there were two dealers in the same product at the same city, it was not thought good business to sell to both plaintiffs and the other dealer. In most instances, the other dealer had been handling the products before the arrival of plaintiffs. In some cases, plaintiffs had invaded the trade territory of established dealers handling products of these suppliers, and that was at least distasteful to these defendants and there seemed to have been ample reason of a business character for the suppliers to refuse to sell to plaintiffs." (Emphasis added.)
>
> [Johnson v. J. H. Yost Lumber Co., supra, p. 61.]

The Yost case, relying on the Beech-Nut case (257 U.S. 441) specifically refers to *facts* which "went beyond the simple refusal to sell."

The rule of freedom of sale to anyone or no one is not absolute. Nor can it be tested in a vacuum. The Colgate case, (250 U.S. 300),

> "was not intended to give blanket sanction for individual discretion in refusal to deal. The Court soon determined that its holding did not extend to protect a course of dealing which *inferentially* spelled out the factor of agreement that Colgate lacked. More important, the Court's landmark decision in Federal Trade Commission v. Beech-Nut Packing Co. places any refusal to deal in its business perspective and then against the full facts scrutinizes all pertinent antitrust prohibitions the trade pattern suggests.
>
> Viewed in the larger business setting, even individually conceived refusals to deal may become an integral element in a violation of Section 1 of the Sherman Act . . . Also, Section 2 may forbid refusals to deal for monopolistic ends. (Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359 (1927).)
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> [Report of the Attorney General's National Committee to Study the Antitrust Laws, March 21, 1955.][3]

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[3]It is with reluctance that the writer of this opinion makes reference to published statements for which he was, to a greater or lesser degree, partially responsible. It is comparable, but not parallel, to a judge citing a Law Review Article he had previously written, whether while on or off the bench. Yet such action has most respectable precedent and authority. For a most recent illustration see dissenting opinion of Mr. Justice Frankfurter in Rogers v. Missouri Pacific R. Co., 352 U.S. 447, 491, decided February 25, 1957. Upon occasion jurists may even revise their extra-judicial views. McGrath v. Kristensen, 340 U.S. 162, 176 (concurring opinion).

The decisions have placed and evaluated refusals to deal in the business setting in which they appear. While refusals to deal in themselves are legally protected, they are examined in their market context. Only thorough-going factual inquiry into the surrounding business circumstances can characterize a refusal to deal as part of a restrictive course of conduct incompatible with antitrust objectives. If we assume, therefore, that all evidence which was introduced was properly before the jury, we cannot hold as a matter of law that there was no substantial evidence from which a trier of fact could not have inferred the existence of a conspiracy, and that the defendant Flintkote knowingly participated therein. Permitting this issue to go to the jury was not error.

Second: Alleged Errors in Admission of Evidence.

Throughout the foregoing consideration of the first problem here presented, we have assumed all evidence before the jury was properly admitted. It is for this reason that the next point appellant raises—that evidence was erroneously admitted—must be considered most carefully. In doing so, we now reach appellant's point 2, (introduction against Flintkote of evidence of the conspiracy between the contractors); point 3, (the Waldron Testimony respecting Ragland's alleged statements of alleged pressure by the conspiring dealers on Flintkote); and point 4, (the Lysfjord testimony respecting Ragland's alleged same statements). At this same time, we also will consider Krause's alleged telephone conversation with Lysfjord.

A. *Introduction as Against the Sole Defendant, Flintkote, of the Facts Relating to the Alleged Conspiracy Between the Acoustical Contractors.*

We must first consider the unique factual situation in this case. The acoustical contractors originally sued had been paid, before trial, for a Covenant Not to Sue Further. This was accompanied by a dismissal. The gravamen of the amended complaint was that Flintkote had joined in an already existing conspiracy. It was therefore incumbent on plaintiffs (1) to establish the prior existence of the conspiracy; who were its supposed members; how they supposedly operated; what their conspiratorial purpose was; and how they brought about their alleged purposes; and (2) Flintkote's subsequent connection with it, before evidence of the acts or statements of alleged co-conspirators would be admissible against the defendant. Two different though not wholly unrelated problems were thus raised. One was the necessity of making a prima facie showing of Flintkote's knowing participation in the alleged conspiracy, and the other was the order of proof in which the evidence thereof would be introduced. We turn to the latter point first.

The rules relating to proof of a civil conspiracy take us into one of the most difficult areas of today's law. As Mr. Justice Jackson said, in his concurrence in the leading case of Krulewitch v. United States, 336 U.S. 440, at 452:

> "When the trial starts, the accused feels the full impact of the conspiracy strategy. Strictly, the prosecution should first establish *prima facie* the conspiracy and identify the conspirators, after which evi-

dence of acts and declarations of each in the course of the execution are admissible against all. But the order of proof in so sprawling a charge is difficult for a judge to control. As a practical matter, the accused often is confronted with a hodge-podge of acts and statements by others which he may never have authorized or intended, or even known about, but which help to persuade the jury of existence of the conspiracy itself. *In other words, a conspiracy often is proved by evidence that is admissible only upon assumption that conspiracy existed.*" (Emphasis added.)[4]

We are in an area of evidentiary law where much is left to the discretion of the trial judge. The trial court has a wide discretion in the admission of evidence which even remotely tends to establish conspiracy. Clune v. United States, 159 U.S. 590, 592, 593; Devoe v. United States, 8 Cir., 103 F. 2d 584, cert. den. 308 U.S. 571; Nee v. United States, 3 Cir., 267 Fed. 84, 87; United States v. Sebo, 7 Cir., 101 F.2d 889, 891.

The trial court has absolute judicial discretion as to the order of proof. United States v. Manton, 2 Cir., 107 F.2d 834; United States v. Newman, 9 Cir., 156 F.2d 8. If he believes it better to allow evidence to be introduced, subject to its being connected up at a later time, that is his prerogative and such rulings are not error.

That procedure is what counsel for plaintiff proposed to follow in this case, when he preliminarily offered proof

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[4]Mr. Justice Jackson, because speaking in a criminal case, refers to the accused defendant. His conclusions are every bit as applicable to a defendant charged with an antitrust violation in a civil private treble damage action.

of conspiracy between the acoustical contractors before he had introduced any proof of the defendant Flintkote's participation therein."

"Mr. Ackerson: . . . but you can always introduce evidence as to purpose and design."

"The Court: Are you contending that the yielding to pressure makes the one who yields a party to the conspiracy?"

"Mr. Ackerson: If he knows the illegal design, and I can prove it."

"The Court: And is that going to be your evidence of connection of this defendant to the conspiracy?"

"Mr. Ackerson: Yes, that plus other knowledge, your Honor, that they knew the design."

"The Court: What other knowledge are you going to bring home to this particular defendant? And is that going to be your evidence of connection of this defendant to the conspiracy?"

"Mr. Ackerson: Yes, that plus other knowledge, your Honor, that they knew the design."

"The Court: What other knowledge are you going to bring home to this particular defendant?"

"Mr. Ackerson: Well, this defendant, the knowledge that I have already stated, that this defendant knew the setup, he knew the effect of the setup, and when he was asked to help and obeyed and, I say, joined the setup by eliminating the only competition in the field, unless he can show that he didn't know anything about it, that he wasn't helping these contractors at all, it is my theory that he joined the conspiracy.

"The Court: The court finds that the complexities of the case now on trial are such, the involvement of the alleged parties to the alleged conspiracy is such, that it is necessary to invoke the rule of convenience, as you have referred to it, Mr. Black, and to allow the evidence of acts and declarations of other alleged conspirators to be admitted into evidence, subject to a motion to strike.

I do not know just what the outcome will be when a motion is made to dismiss at the conclusion of the plaintiffs' case, which I assume will be, on the question of joining a conspiracy because of compulsion, if the compulsion is shown to be in the form of pressure from the Association, pressure from other vendors. That would be evidence, I take it, circumstantial evidence, or offered as circumstantial evidence, of the joining of a conspiracy, but you are going to have to have enough, Mr. Ackerson, that the reasonable inference to be drawn from all the facts is that it was a yielding

The court specifically deferred and reserved a final ruling on the admissibility of this evidence until after the

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to the combine and becoming a member of it, otherwise we will have to, in the language of the street, throw your case out."

"Mr. Ackerson: I realize that."

"The Court: But for the present we will follow the rule of convenience and admit the testimony."

[Tr. 293, et seq.]

"The Court: As a general principle of conspiracy law, every person who is a co-conspirator of course is presumed—that is, every person who is alleged to be a co-conspirator with the person on trial as conspirators, is deemed to be their agent once he is shown to be a member of the conspiracy, and statements which are made in furtherance of the conspiracy may be admitted.

I think the courts here have generally been admitting statements and doing so subject to a motion to strike if it does not appear that there develops a jury question as to whether there was a conspiracy, as to whether the person who is on trial and the persons whose statements have been received, have been connected to it."

"Mr. Ackerson: I think that is right."

"The Court: Unless you have some other way you would like to handle it, I am disposed to adopt that as a policy of this case, as the other judges have done in the cases tried before them, and entertain a motion to strike if the connection is not provided by sufficient evidence to create a jury question."

"Mr. Ackerson: I don't know of any other way you can try a case like this, your Honor."

"Mr. Black: Your Honor please, it may be we are at that point where we should address ourselves to your Honor in the absence of the jury, because I think that we would like to be heard somewhat extensively on that proposition.

[Tr. 259, 260]

"The Court: Objection overruled. I will not have so many of these but what I can strike them, if it turns out to be illegal after hearing your argument, and I will hear you fully at the time the jury takes its morning recess."

"Mr. Black: Thank you."

"Mr. Ackerson: I am about through with this particular conversation. I think this is the last such conversation."

"Q. (By Mr. Ackerson): Will you relate that conversation with Mr. Ragland?

* * * [Conversation related] * * *

"Mr. Black: Just a moment. I wish the record to show we move to strike this answer in pursuance of our objection."

"The Court: Ruling will be reserved until after I hear your argument." [Tr. 262, 263]

plaintiffs' case was fully in; and advised counsel for the defendant his rights to move to exclude the entire line of testimony were protected.

It was not error for the court initially to invoke this "rule of convenience," as it was denominated in the courtroom. The court had very carefully and properly brought home to counsel for the plaintiffs the necessity of proving by competent evidence that Flintkote "yielded to the combine, and became a member of it." [Tr. 294]

Was competent independent evidence ever introduced?

B. *The Plaintiffs' Testimony as to Statements of Others.*

This brings us to a consideration of the alleged errors in admitting the testimony of Waldron and Lysfjord, as to the alleged statements of Ragland and others.

The only evidence that plaintiffs offered to prove defendant's "yielding," and the joining by Flintkote of the conspiracy, other than the act itself of refusing to sell, was the respective testimony of Waldron and Lysfjord relating to (a) alleged admissions of Baymiller; and (b) alleged admissions of Ragland; and (c) the testimony of Lysfjord with respect to a telephone conversation directly with Kraiise. These alleged statements or admissions can be divided into three conversations:

Conversation Number 1 was a hearsay statement largely made up of conclusions, by Ragland to Waldron and Lysfjord on or about February 1, 1952; at the Atlantic Avenue office of Aabeta Company covering (a) what

Krause allegedly told Ragland on a previous date at the Flintkote office;[6] (b) what Howard had "complained" to

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[6]Mr. Waldron: "Mr. Ragland said that he (Krause) came to their office—or his office and his desk, and got so abusive that he had to tell him that he would have to leave him and when he could be more rational he would return.

Now, he was telling him that they couldn't stand for us the aabeta co., selling acoustical tile." [Tr. 262, 263]

"Q. [Asked of Mr. Lysfjord]: What about any statement to Mr. Ragland by Mr. Gustave Krause?"

"A. I don't recall that he said any more at that time. However, there was another meeting where Mr. Gustave Krause did state very violently what he thought of us going into business."

"Q. Who told you that?"

"Mr. Black: That is objected to."

"Mr. Ackerson: Yes, you may strike that."

* * * * * * * * * * *

"Q. (By Mr. Ackerson): Did Mr. Ragland relate this conversation to you by Mr. Krause?"

"A. Yes, sir."

"Q. Will you state what Mr. Ragland told you, what he said as nearly as you can in substance?"

"Mr. Black: It will be understood of course that our objection runs to all of this?"

"The Court: Are you speaking to the objection you urged last week?"

"Br. Black: Yes, the objection that it is pure hearsay, that there is no authority in the agent to narrate past events."

* * * * * * * * * * *

"Mr. Ackerson: Will you read the question, Mr. Reporter?" (The question referred to was read by the reporter as follows: "Q. Will you state what Mr. Ragland told you, what he said as nearly as you can in substance?")

"Mr. Ackerson: That is concerning Ragland's conversation with Mr. Krause."

"The Witness: Mr. Ragland told me that Mr. Krause came into the office and talked——"

"Q. (By Mr. Ackerson): Into the Flintkote office?

"A. Into the Flintkote office, and talked so loudly to Mr. Ragland and pounded on the desk a little bit that Mr. Ragland got up and left and told Mr. Krause that if he couldn't talk as a gentleman he didn't want to talk to him any more, and until such time as he could behave as a gentleman, that he, Ragland, would come back and talk with him."

"Q. Did Mr. Ragland say what Mr. Krause was talking about?"

"A. He was objecting very strenuously to the aabeta company being in business."

someone about, at or about that date, perhaps in the hearing of Ragland, at the Flintkote office;[7] (c) about conversations occurring at an alleged meeting of certain of the conspirators, (Krause, Howard, Newport and Lewis)

"The Court: You cannot say he was objecting. That is a conclusion. You have to tell us what was said and then the jury can decide whether he objected to something or applauded, or something in between."

"The Witness: Well, I don't know how else to say it because that was what he was doing."

"Mr. Black: You weren't there."

"The Court: That is what he was doing? You tell us what he said. Of course you cannot remember it word for word, but you can say in substance he said A, B, C, D, and so forth, and go ahead and relate the substance of the conversations. Then it will be up to the jury to determine whether that was an objection or not."

"The Witness: I don't know quite how to answer that."

"Q. (By Mr. Ackerson): Did Mr. Ragland—are you relating Mr. Ragland's word to you as far as the word 'objection' goes, or did Mr. Ragland say Mr. Krause used other words?"

"A. He used the word 'objected.' He said, 'I object very much to the aabeta company being in business, in competition with us, using the same type of tile.' That is why I keep saying 'objected.' That is the word he used."

"The Court: If that is the word he used, that is all right. I thought you were using a word which you thought his words added up to."

"The Witness: Oh, no. Mr. Krause, very definitely said those words, as I recall what Mr. Ragland told me, that he objected very strenuously to the aabeta company. He used the words 'I object to the aabeta company being in business here in the Los Angeles area, using the same type of acoustical tile that we are a dealer for.'

And that is the time when Mr. Ragland decided to leave, not wanting to listen to the loud conversation, and he told me it was loud. That is not my assumption. He said he didn't like it, so he left. He left for about 10 minutes as I understand it—or I was told rather—and then went back and talked further with Mr. Krause. What they talked further about, I do not know" [Tr. 475 to 480, incl.]

[7]Mr. Waldon: "Yes, he (Mr. Ragland) said a Mr. R. E. Howard was down there complaining also."

"Q. (By Mr. Ackerson): And what did he say that Mr. Howard said, if anything?"

"A. I don't know any exact words, except he mentioned that they were trying their best to force an issue to stop our operations." [Tr. 269, 270]

wherein "boycott" was threatened by Mr. Newport, and objections were voiced by others.[8]

Conversation Number 2 was a portion of the conversation allegedly occurring on February 19, 1952, between Ragland, Baymiller, Thompson, Lysfjord and Waldron, when the plaintiffs were advised of Flintkote's refusal to sell further.[9]

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[8]Mr. Lysfjord: "Well, Mr. Ragland came into the office, met me at the office, and mentioned that in his words, things were getting a little bit hot. He said that pressure that you were talking about is starting to show up. The competitors of yours in the field are beginning to pick up your figures, and the fact that you are bidding against them around in this general area.

The manager of Howard Company, Mr. Howard, and Mr. Gustave Krause from Coast Insulating, a Sidney Lewis of Flintkote Company—I believe one of the principals there—and Mr. Newport, all had a meeting."

"Q. Who is Mr. Newport?"

"A. He is a principal of Coast Insulating. All of these are Flintkote dealers, incidentally."

"The Court: Are you telling this as a conversation?"

"The Witness: I am saying what Mr. Ragland told me."

"The Court: Very well."

"The Witness: That they had this meeting objecting very strenuously to the fact that we were in business, the aabeta company was in business.

One of the very strongest statements was from Mr. Newport, saying that he would boycott, I believe the word was, all of Flintkote's materials and see that it wasn't used in the area, and he was willing to spend $40,000 or $50,000 to do it." [Tr. 474, 475.]

"Q. (By Mr. Ackerson.): Did Mr. Ragland state the conversation of Mr. R. E. Howard on this occasion?"

"A. Only that he objected very violently. I don't recall the exact words." [Tr. 476.]

[9]"Mr. Waldron: . . . I asked Mr. Baymiller if they wouldn't hold up, or why they didn't hold up, to our agreement, and that I said the pressure must have been terrific. And he said, 'Yes, we had the pressure all right.'" [Tr. 257.]

Mr. Waldron's cross-examination. (Testimony from Deposition of Mr. Waldron):

". . . I said the pressure must have been terrific from our

Conversation Number 3 was an alleged telephone call between Krause and Lysfjord occurring "after the severance" [Tr. 267], of relations between Flintkote and the plaintiffs, and after the date the conspiracy was found by the court to have ended.[10] Upon motion of defendant, this conversation was struck out [Tr. 268], but after argument, the ruling was "recalled," apparently to be reconsidered at the end of plaintiffs' case, when all defendants' motions to strike were denied.[11]

It is difficult to understand from the record precisely the theory upon which these various conversations were held admissible. At times both court and counsel talk of "res gestae," and at other times of "admissions," sometimes referring to "overt acts in furtherance of a conspiracy," at other times to the theory of "agency."

These three conversations had by plaintiffs, involve individuals in two distinguishable categories—Ragland and Baymiller, employees of the defendant Flintkote; and Krause, an alleged "officer, director and managing director,

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competition to cause this to happen. He said there was pressure, and that is all he said." [Tr. 362.]

Mr. Lysfjord: "And then I believe Mr. Waldron mentioned, 'I guess the pressure started to work a little bit more than you anticipated, and that you are becoming worried about it.' . . . Mr. Baymiller stated that there was considerable pressure brought to bear." [Tr. 489, 490.]

[10]Mr. Lysfjord: He [Krause] told me he didn't want me to feel that there was anything personal about his being chosen to front for the organization, association, which is the Contractor's Association, and their own interests; to force this termination of selling us acoustical tile." [Tr. 267.]

[11]"The Court: Considering all evidence before the court, the motions to strike are denied and the motion to dismiss is denied. Bring in the jury." [Tr. 766.]

of Coast Insulating Products,[12] a California corporation,"[13] one of the dismissed defendants at time of the

The status of the various declarants poses distinct issues as to the admissibility of each of their statements. Requisite to the admission of incriminating statements attributed to Krause, Newport, and Ragland (in an alleged capacity other than as an agent of defendant) is a prima facie showing of Flintkote's participation in the conspiracy by competent evidence apart from the alleged statements. On the other hand, no such foundation need be laid for the alleged admissions of Baymiller and Ragland, if they were acting as agents within the scope of their employment for the defendant company.

We start with the major premise that all such statements were hearsay. In fact, when Waldron or Lysfjord told the jury what Ragland said Krause had told him, we have hearsay placed upon hearsay; and when the plaintiffs testified that Ragland told them what Krause or Newport or Howard had said at a meeting, concerning which there had been no proper foundation laid as to whether Ragland was present, we have hearsay placed upon hearsay placed upon hearsay.

It is true that there are so many exceptions to the hearsay rule that much of the evidence which decides lawsuits is made up of hearsay evidence. But this does not eliminate the hearsay rule as a vital and important rule of evi-

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[12]Amended Complaint, ¶10.

[13]Amended Complaint, ¶15.

dence, nor permit us, or the lower court, to open wide the floodgates to any evidence, in total disregard of the rule. trial.

One of the very best reasons for the hearsay objection is to prevent the presentation of self-serving statement.[14] The instant case is a perfect example of the reason and of the necessity for the rule. Without in any way passing upon or inferring as to the credibility of witnesses who testified, we here have two of the three most interested parties to the lawsuit ascribing vital culpatory statements to Krause;[15] to Newport; to Howard; to Baymiller; to Thompson; to Lewis and to Ragland, each one of whom (except Newport who did not testify) denies both any recollection of the specific alleged statements, and of the fact sought to be proved by the hearsay statement.

But the hearsay rule serves another more important purpose. It requires the person asserting a fact to be present in the courtroom, and to subject himself to the

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[14]In many instances, the danger of fabrication as to whether the statement was or was not made may be as great as the danger that a statement by a declarant was a false representation of the fact stated. This, however, does not preclude admissibility as long as the statement is not used for assertive purposes."

Mason Ladd, "The Hearsay We Admit." 5 Okla. L. Rev., 271, 280.

[15]Krause took the stand and denied that he had made any threats, although he readily admitted that he expressed displeasure. He claimed no right to influence or attempt to influence Flintkote; he denied he had used the word "boycott." [Tr. 1129.] The defendant's employees also denied any such statements.

best method yet devised for a determination of the truth of a fact; cross-examination.[16]

There are many exceptions taking hearsay evidence out of the general rule of inadmissibility. We will discuss the general exceptions as they relate to each conversation individually.

Conversation Number 1:

Ragland's alleged statements were in part a narrative of past events and in part double hearsay. In either case it

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[16] As one writer has said:

"The protection of the jury from being misled surely is a factor to be considered if a statement made out of court is to be regarded as intrinsically weak, subject to a cover for fraud, or containing the possibilities of error or mistake caused by bias, failure to understand, or the imperfection of memory. However, the hearsay rule applies in equity as well as in jury trials. Therefore these reasons alone, formidable as they appear, are not always sufficient to justify the exclusion of hearsay evidence. Professor Wigmore, in his thorough analysis of the hearsay rule of exclusion, concludes that the rule exists because of the lack of opportunity to cross-examine the declarant of a perceived fact as a testing process in the attempt to discover the truth. If the witness is a person who has personal knowledge, he may be examined as to the accuracy of his perception, memory, words of communication, and his sincerity or truthfulness. This is in line with the distinction between a deposition and an affidavit; for under the former the truth-testing device of cross-examination has been made available. Professor Morgan includes all of the reasons expressed above when he states:

> 'Hearsay is excluded because of potential in infirmities with respect to the observation, memory, narration and veracity of him who utters the offered words when not under oath and subject to cross-examination.'

He also regards the hearsay rule of exclusion as now being directed more towards protecting the adversary than towards safeguarding the triers of fact, although both are so interrelated that it is hard to consider the effects separately. The rule at least rests in the hands of the adversary because, unless objection is urged, hearsay evidence will be admitted for consideration by the triers of fact."

"The Hearsay We Admit." Professor Mason Ladd. Okla. L. Rev., 271, 272.

was necessary in view of the fact that Ragland did not himself testify about the declarations of the alleged co-conspirators that his alleged statements came within some exception to the hearsay rule.

A number of theories exist under which the alleged statements of Ragland might have been offered against the defendant Flintkote, as exceptions to the hearsay rule: (1) As an admission of a party's authorized agent; (2) as a statement of a co-conspirator; (3) as a statement made as part of the res gestae.

Here it should be kept in mind that the evidence was never offered against the declarant Ragland individually, for he was not a party to the action.

Evidence of a hearsay statement is admissible against a party to the action if the judge finds: (a) the declarant was authorized by the party to make a statement for him concerning the subject matter of the statement; or (b) the party, with knowledge of the content of the statement by words or conduct manifested his adoption or approval of the statement or his belief in its truth.[17]

Here there was no attempt to prove that Flintkote adopted or approved of Ragland's statement as to what Krause, Howard and Newport had said, as to alleged threats. Hence plaintiff was left with the possibility of showing that Ragland had authority to make alleged statements purporting to establish the threats.

No evidence was offered to establish direct written or oral authority. Plainly, counsel relied on an implied or

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[17]American Law Institute, Model Code of Evidence, Rule 507; Pekelis v. Transcon Rental & Western Air, Inc., 2 Cir., 187 F. 2d 122, 128; United States v. United Shoe Machinery Corp., 189 Fed. Supp. 349, 351.

inferred authority from Flintkote to Ragland, to make the statements described by Waldron and Lysfjord. Technically, we believe such a reliance takes the hearsay declaration out of the "authorized declaration" class of exception to the hearsay rule, into the *"vicarious admission"* rule. That rule has been expressed as follows:

> "Evidence of a hearsay declaration is admissible against a party to the action if the judge finds (a) the declaration concerned a matter within the scope of an agency or employment of the declarant for the party and was made before the termination of the agency or employment, or (b) the party and the declarant were participants in a plan to commit . . . a civil wrong, and the hearsay declaration was material to the plan or its subject matter and was made while the plan was in existence and before its execution was complete . . ."[18]

Subdivision (b) presents no very difficult problem. The alleged conspiracy did not, either as pleaded, or as the case was tried, attempt to charge or make Flintkote's employee, Ragland, a member of the alleged conspiracy,[19]

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[18]Model Code of Evidence, Rule 508. In connection with subdivision (a), see Peoples Gas Co. of Kentucky, Inc. v. Fitzgerald, 6 Cir., 188 F. 2d 198; State Farm Mut. Auto Insur. Co. v. Porter, 9 Cir., 186 F. 2d 834; American Ins. Union v. Lowry, 5 Cir., 62 F. 2d 209; Sharpless Separator Co. v. Skinner, 9 Cir., 251 Fed. 25. The decisions propounding the rule set forth in subdivision (b) are legion. See e.g. Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229, 249.

[19]While there were statements in colloquy between counsel and the court indicating that plaintiffs relied on the proposition that all employees of defendant Flintkote were agents and co-conspirators [Tr. 259], it cannot be seriously urged that naming a corporate defendant a co-conspirator makes every employee of said corporation a co-conspirator; subject to the rules of evidence which relate to a conspiracy.

or a "participant" who "planned" to commit a civil wrong. Subdivision (b) is really an extension of the usual rules applicable to conspiracies, and the admissibility of admissions made by a co-conspirator.[20]

We think Wigmore hits the nail on the head when he observes that our problem is one of the law of agency, not of the law of evidence.

> "He who sets another person to do an act in his stead as *agent* is chargeable in substantive law by such acts as are done under that authority; so too, properly enough, admissions made by an agent *in the course of exercising that authority* have the same testimonial value to discredit the party's present claim as if stated by the party himself.
>
> *The question therefore turns upon the scope of the authority. This question, frequently enough a difficult one depends upon the doctrine of Agency applied to the circumstances of the case, and not upon any rule of evidence.* (Emphasis added.)
>
> IV Wigmore, 3rd Ed., § 1078.

Let us examine the record to see what was Ragland's capacity with Flintkote. Ragland left the employ of the Flintkote Company on April 1, 1955.[21] He had started

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[20]In commenting on it, for example, American Law Institute's Model Code of Evidence points out that subdivision (b) does not accept the rule as generally stated with reference to declarations of co-conspirators, which require the alleged statement to *further* the conspiracy, not merely be *material* to it. "The tendency in the authorities is to receive evidence of all declarations of a conspirator concerning the conspiracy when made during its pendency." We do not here pass on the question of whether a declaration which does not tend to further the objects of the conspiracy is admissible.

[21]Hence, the witness Ragland was not employed by defendant Flintkote during the trial of this action.

that employment February 1, 1951. He had started as a field service engineer, "to promote the general line of insulation board products, which had no connection with acoustical tile." On June 1st, 1951, he "was given the job of sales promotion for acoustical tile, in which he remained." Ragland had worked with the two plaintiffs previously, and was friendly with them. They met socially on frequent occasions, and Ragland wanted to help them become representatives of Flintkote, if he could.

Ragland, as "promotional salesman," worked under an assistant sales-manager, of the Southwest Division, of the Pioneer Division, of The Flintkote Company, a Mr. Browning Baymiller. Baymiller's immediate superior was a Mr. E. F. Thompson, Sales Manager. Thompson's immediate superior was Mr. Frank S. Harkins, who "had charge of all activities of the building material division."

The determination of whether or not Flintkote was to contract with plaintiffs was passed "upwards" seriatim by Ragland to Baymiller to Thompson to Harkins. Ragland had no executive duties for the corporate defendant, but was a representative at the lower echelon.

There was an utter lack of proof of any questioning seeking to establish Ragland's authority to speak on behalf of Flintkote, concerning the alleged incriminating statements of Krause, Howard, and Newport, threatening Flintkote with a boycott.

We must consider the admissibility of such hearsay statements under the *res gestae* exception. Wigmore has this to say:

> "In two departments of substantive law this use of 'res gestae' has been very common, namely in the

law determining liability for the acts of an agent and for the acts of a co-conspirator. The acts and admissions of an agent are available to charge the principal when they occurred in the course of his employment; and of a co-conspirator, when they occurred in the duration of the conspiracy. It is often attempted to designate this course of action, which thus limits the range of chargeable acts as 'res gestae.' But the scope of it is to be ascertained wholly from the substantive law on those topics, not from any rule of evidence."

VI Wigmore, Evidence, supra, § 1769.

"The phrase 'res gestae' has long been not only entirely useless, but even positively harmful. It is useless, because every rule of Evidence to which it has ever been applied exists as a part of some other well established principle and can be explained in terms of that principle. It is harmful . . . (and) ought therefore wholly be repudiated, as a vicious element in our legal phraseology."

VI Wigmore, 3rd Ed., p. 182.

We conclude that if the alleged admission in Conversation Number 1 is not admissible as a statement of a co-conspirator or of a party's authorized agent, it is not admissible under any theory; i.e., it does not fall within the legitimate and accepted *res gestae* exceptions of Spontaneous Exclamations, Verbal Acts, or Statements of a Mental Condition.

VI Wigmore on Evidence, 3rd Ed., § 1768.

We cannot pass on whom the jury could, or should believe, but we have the duty of seeing that any evidence

ordinarily inadmissible as hearsay, is admitted into evidence for the jury to consider only when a proper foundation for its admission has been laid.

The discussion of both counsel throughout the trial recognized the responsibility resting in the trial court. The trial court recognized it. But when this complicated case went to trial, (without the usual pre-trial conferences), the court was pressed for immediate answers on involved procedural and evidentiary points. We conclude the court erred (a) in permitting the introduction of this hearsay evidence (Conversation Number 1, supra) without any foundation showing the extent and scope of the authority resting in the employee Ragland, if any, to act for and bind the corporate defendant; and (b) in refusing to grant the defendant's motion to strike, made at the conclusion of the plaintiffs' case, relating to the same "vicarious admissions" allegedly made by the witness Ragland.

What was the effect of the erroneous admission of this evidence?

Here we have testimony introduced which goes to the very heart of plaintiffs' cause of action and to defendant's defense. Why did Flintkote terminate the contract? No reason was placed in writing. The only evidence (other than the bare refusal to sell, which was equivocal) were the conversations. Of these a reading of the record persuasively demonstrates that Ragland's alleged statements were by far the most significant and the most damaging to defendant's cause. They spelled out in clear perspective the nature of the conspiracy and brought the events home to the jury with the dramatic and incisive impact that only admissions can produce. This was de-

fendant's own former employee outlining the unlawful scheme. The full effect of this evidence on the jurors' minds cannot be measured with precision. To deny that it influenced the jury's verdict in a material manner is to ignore reality. What the verdict would have been had this evidence not been introduced is not certain. Moreover, it is not our function to decide a hypothetical case. We must rule on the basis of what actually transpired in the court below and under the circumstances here presented we hold that the admission of Ragland's statement constituted prejudicial error.

Conversation No. 2:

The statement attributed to Baymiller (Conversation Number 2, supra) again tenders the question of agency. Baymiller may or may not have been an executive officer of defendant company, authorized to bind that company by his statements. He was Ragland's immediate superior. His position, and his activity in connection with the subject matter of this action justified the admission of his alleged statement for whatever probative value it may have had, provided that a proper foundation had been laid. We need not pass upon that issue here; nor upon the question of what the jury might have decided if this testimony was properly admitted, and the inadmissible Conversation Number 1 excluded.

Conversation No. 3:

Conversation Number 3 involves no question of agency, for Krause was neither agent, servant nor employee of the defendant Flintkote. Krause was named as a co-conspirator in the amended complaint. [¶10, Tr. 20.] Thus if plaintiff had made a prima facie showing that there was a conspiracy and that Flintkote had joined the

952:

* * * Mr. Ragland came to my office immediately upon his return, and I gave him the information that I had and what I had done up to date and for further instructions or further information why for him to see Mr. Lewis.

962 (Baymiller Cross-examination):

Q. Did Mr. Lewis tell you to call on these three contractors? A. Yes.

Q. And he named Newport, Hoppe and Howard, didn't he? A. Yes, sir.

Q. Did he also name Gus Krouse out at Coast Insulating? A. Well, Krouse and Newport would be considered in the same company.

979:

Q. I believe you stated, Mr. Baymiller, that Mr. Waldron or Mr. Lysfjord did make the statement that there would be objections by competing contractors when they got the tile—if they got your line of tile? You stated that, didn't you? A. Yes, I stated that.

982:

Q. Now, you stated that you went out to see Newport, Howard and Hoppe after you talked with Mr. Sidney Lewis. A. Correct.

Q. You went out to their offices and you had a conversation with each of them, Mr. Newport, Mr. Hoppe and Mr. Howard? A. Correct.

Q. Is that correct? A. That is correct.

984:

Q. Now you stated that when you got out to Mr. Newport, the No. 1 call, Mr. Newport wanted to know if you had established a new dealer in the Los Angeles area, is that right? A. That is correct.

984-985:

Q. And Mr. Newport did not suggest any action to you at that time? A. No, sir.

Q. Did he tell you that he had already conferred with Mr. Lewis or Mr. Harkins? A. No, sir.

Q. But Mr. Lewis told you, didn't he? A. Mr. Lewis told me.

Q. So that your answer yesterday was the same as today, it was limited to what he said to you personally, not what he may have said to Lewis or to Harkins or anyone else? A. That is correct.

* * *

Q. Well, now, did you call Mr. Howard for the appointment you had with him out at this place? A. Yes, I called Mr. Howard.

Q. What did you ask Mr. Howard? A. I asked him no questions whatsoever.

Q. Didn't Mr. Howard object to these people being in business here? A. They were not in business here.

Q. Didn't he object to their soliciting contracts here? A. Not necessarily.

Q. What did he say in that regard? A. He just asked me virtually the same thing as Mr. Newport did, as to whether or not we had set up an additional customer in the Los Angeles area.

986:

Q. And at no time during that meeting Mr. Howard objected to the solicitation of contracts here by the plaintiffs, is that your statement? A. We had no direct or no concrete facts or evidence that there was business being solicited here. At that time we had not established the extent to which the plaintiffs had entered the Los Angeles field.

988:

Q. Now I assume your statement would be about the same with respect to Mr. Hoppe, wouldn't it? Are there any substantial differences in what happened with Mr. Hoppe? A. No difference whatsoever. It was all the same.

990:

Q. When Mr. Ragland got back he came directly to your office, didn't he? A. I believe I was the first party he talked with in our office.

Q. You told him about these rumors? A. I told him about the rumors and I told him about my three calls to our three customers, and what I had told them and they had accepted it, what I had told them, and we were just waiting for him to get back to make an investigation of the plaintiffs' activities.

Q. Then you sent him into Mr. Lewis' office, is that right? A. I don't know as I sent him. I suggested he go to see Mr. Lewis and he did.

Q. He did? A. Yes, he did.

992:

Q. To your mind was there any necessity for Mr Ragland to get in contact with Messrs. Howard, Hoppe, Newport or Krause? A. Not that I know of, no.

Q. There would be no necessity for it? A. I don't know as he did.

Q. But you can figure out no reason why he should cover the same ground, can you? A. No.

1001-1002 (conversation No. 2 in Circuit Court's opinion):

Q. Yes. You were asked the question by Mr. Black, substantially to this effect: Do you recall either of the plaintiffs stating or any conversation relating to pressure from acoustical tile contractors?

And your answer, similar to a previous one, said, "I don't recall the word 'pressure.'" Do you recall that? A. I recall that question, yes.

Q. Well now, isn't it a fact that Mr. Waldron did, whether he used the word "pressure" or not, state that the compulsion or the force or the persuasion, or something from the acoustical tile contractors, must have been terrific to make Flintkote do this thing? Didn't he voice that thought to you personally, Mr. Baymiller? A. No, he did not voice it in that respect to me.

Q. In what respect did he voice it to you? A. He merely casually mentioned that he had suspicion of a compulsion by other contractors, and I believe Mr. Thompson answered that by saying that that had no bearing whatsoever in determining the severance of this relation.

Q. Isn't it true that you yourself stated to Mr. Waldron, "Yes, there has been pressure"? Do you recall using that?

1004:

Q. Specifically did Mr. Thompson say that he was sorry he had to make this decision because he was ordered to do so by higher-ups in the company? A. *He could have placed it with those words, but I do not recall his exact words.* (Emphasis added.)

1009 (Hoppe's testimony—direct):

Q. During the course of your business operations with Sound Control Company, and specifically in the early part of 1952, did you have any information about the operations of a company called the aabeta company? A. One of my salesmen—you understand I was not as close to my business, sir, as a lot of employers possibly are, and I possibly should have been—but one of my people came in and said that there is a new firm called—I don't know whether he called it the aabeta company or the aabeta company—* * * ?

Q. Did you have any discussion following that with the Flintkote people? A. I do not recall any. Mr. Baymiller testified today that he came to my office. I do not recall that. He may have called on one of my men.

Q. Did you have any discussion with any other Flintkote distributor with respect to the aabeta company's operations? A. Oh, scuttlebutt, yes, wondering how many applicators we might wind up with. * * *

1011:

A. Mr. R. E. Howard was in my office one day and he said he had heard that there was another company called the aabeta company, whom I had previously heard about from one of my employees, who was figuring tile in the Los Angeles area.

I said I thought they were restricting that to three. I hope they do not get any more.

1017-1018 (Cross-Examination):

Q. You stated that Mr. Howard came over to your place of business and advised you of—I believe you said, one of your employees advised you they were doing business, the plaintiffs were doing business in Los Angeles? Was that your testimony? A. That is correct.

Q. Then subsequently Mr. Howard spoke to you about it? A. Mr. Howard dropped by my office, I believe. * * * He used to be a lather and he worked on plastering jobs for me. We were good friends.

He dropped by my office and said he understood this new aabeta outfit, had I heard of them.

* * *

I said, "Gee, I thought there were only three of us. I hope they don't scatter it to the winds," or words to that effect.

Q. Is it a fact, though, isn't it, neither of you were very happy about having another competitor in the area,

were you? A. We never welcome—we have enough without welcoming it sir. * * *

1042 SIDNEY LEWIS (Direct):

Q. What is your relationship with Mr. Harkins, or was when Mr. Harkins was with the company, and Mr. Thompson? A. I was Mr. Harkins' assistant.

Q. (By Mr. Black): What next did you have to do in connection with the plaintiffs in respect of your duties at the Flintkote Company? A. Well, the next activity in which I was involved was a telephone call from Mr. Krause.

Q. About when did that occur? A. As I recall, it was in the first or second week of February.

Q. Who is Mr. Krause? A. Mr. Krause was, I guess, sales manager—he is associated with, was then and still is, I believe associated with Coast Insulating Products as the sales manager.

Q. Did he call you or you call him? A. He called me.

Q. What was said on that occasion? A. As my recollection goes, Mr. Krause called me and said the *plaintiffs had, were doing business in the city of Los Angeles, and requested that action be taken to correct the situation* because, as he understood it, the customers we had had previously were all he felt we wanted in the city of Los Angeles. (Emphasis added.)

Q. Was Mr. Krause rather emphatic on that occasion? A. Decidedly so. * * *

Q. *Was anything more said that you remember?* A. *Well, he was insistent that action be taken immediately,* and I said that inasmuch as the individuals who had made the direct arrangements were not available at the moment that when we had time to make a thorough investigation we would take the proper action. (Emphasis added.)

(Compare this to the contrary testimony of Ragland, Baymiller, and Heller in their meetings with defendant's competitors.)

1050 (Sidney M. Lewis—Cross-examination):

Q. You heard of no contact by Mr. Hoppe with Flintkote during this period? A. *I don't recall any, no. I don't say it didn't happen, because he may have talked to Mr. Harkins and I may not have known it.*

Q. *Was it ever brought to your attention that Mr. Hoppe did object strenuously other than through Mr. Krause?* A. *No, only through Mr. Krause.* (Emphasis added.)

Q. But Mr. Hoppe did cease handling Flintkote, you state, the first part of 1952? A. That is correct.

Q. *You stated that when Mr. Krause called you in his emphatic way he objected very strenuously and he wanted immediate action, is that right?* A. *That is correct.*

1064 *et seq.* (Harkins—direct):

"The next time I had anything to do with the operations was when I returned from San Francisco in, I would say, February sometime of '52. I got back from San Francisco I believe on a Wednesday morning and I stayed at the office and Mr. Lewis came into the office and said that there had been some difficulty. * * *

1065:

Mr. Lewis also told me that he had a telephone call from Mr. Krause of Coast Insulating, and the Mr. Krause had wanted to get a meeting of some kind together to discuss the situation, which was not in accordance with our understanding, and Mr. Lewis said that he or nobody from the company would attempt such a meeting. He said, "Did I do right?"

I said, "Eminently."

I said, "There will be no meetings of that sort with the distributors at this point."

So I got a hold of Mr. Newport, who I have known for many years, and I told Charlie that we would have lunch on Friday together, which we did.

Do you wish me to continue from there?

Q. Yes. What did Mr. Newport say on that occasion? A. *Well, I went out to his place of business and picked Mr. Newport up and we went over to the Brown Derby.*

Before we left for the Brown Derby I told Mr. Newport that I had heard about this story that Krause had called in, and so forth.

1090 (Harkins—Cross-examination):

Q. You know these complaints have been referred heretofore as rumors, Mr. Harkins. When these contractors called your attention in any manner to the operation of the plaintiffs in Los Angeles—I mean called Mr. Lewis' attention,—I mean Mr. Lewis called your attention to it?

* * *

You didn't testify that Krause wanted a meeting? A. I said that Mr. Lewis had told me.

Q. Mr. Lewis had told you? A. Mr. Lewis had told me when I came back from San Francisco that Mr. Krause had called and wanted to get together and discuss the aabeta activity in the City of Los Angeles.

* * *

1091:

Anyway, when you got back from San Francisco, Mr. Harkins, you called up Charles Newport. A. Yes.

Q. And you went out to the Brown Derby for luncheon. A. Yes.

1092:

Q. Did Sidney Lewis tell you that he asked Baymiller to investigate it? A. No. I will tell you what I think Sid said. He said that, "Under no circumstances would we or any representative of the company attend such a meeting," and Sid said, "I have told Baymiller to go out and call on Dick Howard, because Dick—"

That is how we got in on the ground, was Browning—"I told Browning to go call on Dick Howard and see what all the shouting is about," or words to that effect. "I knew you would get hold of Mr. Newport."

Q. There had been some shouting? A. *The report was they were quite upset about this activity downtown.* (Emphasis added.)

1098 (Harkins.):

Q. And a part of your testimony on direct was that this finding out that the plaintiffs had a warehouse in Los Angeles caused a lot of commotion, is that right? A. I don't think I said that. I think I said, Mr. Ackerson, that their activity when I got back from San Francisco apparently had created some commotion, according to the report I got from Mr. Lewis. * * *

Q. *In other words, it was the fact that they were doing business?* A. *That's is right.* (Emphasis added.)

1100:

Q. But you didn't know that Mr. Baymiller—you did say that you knew that Mr. Baymiller had himself made an investigation? A. I knew that Mr. Lewis told me, as I recall it, in that same conversation that he had sent Mr. Baymiller over to see Mr. Howard, and that he said I knew you would see Mr. Newport.

Q. Did he say that he had also sent Mr. Baymiller over to see Mr. Newport? A. No.

Q. Did he say that he had also sent Mr. Baymiller over to see Mr. Hoppe? A. Not that I recall. He most likely did in that conversation.

1101:

Q. (By Mr. Ackerson): So that, I take it then, Mr. Harkins, that the investigation made was one investigation that was made by Mr. Baymiller, and you had a conversation with Mr. Newport about this same subject matter of the plaintiffs' business in California, and then Ragland was delegated by you to investigate? A. That is correct.

Q. And on top of that Lewis had received these communications and transmitted them to you, that is, communications from the contractors? A. That is correct.

Q. All of those things happened? A. Yes.

1109-1111 (Heller Testimony, Direct):

Q. Did you have anything to do with talking to distributors of products of The Flintkote Company with reference to aabeta? A. Well, I did go out to Coast Insulating Products Company in the accompaniment of Mr. Baymiller one afternoon, and we talked there with Mr. Krause and Mr. Newport in Mr. Newport's office.

Q. And what, if anything, do you recall that was said generally at that meeting? A. *Well, both Mr. Krause and Mr. Newport were quite upset over the fact that Flintkote Company was selling aabeta.* (Emphasis added.)

* * *

Q. (By Mr. Black): What was said at that meeting by you or Mr. Baymiller, if you remember? A. I can tell you, as I remember the conversation.

Q. That is what I am talking about. A. Mr. Krause and Mr. Newport were upset because Flintkote was selling aabeta. * * *

Q. What did you or Mr. Baymiller say on that occasion? A. Well, both Mr. Baymiller and I said that the

decision was not with us, we did not have the authority to make a decision as to whether the Flintkote Company sold aabeta or not. That that decision would have to come from Mr. Harkins.

* * *

1111-1112:

Q. What else did you hear on that occasion? A. Well, after we left Coast Mr. Baymiller and I went over to the offices of Sound Control.

Q. Whom did you see there? A. *We went to Sound Control and went in Mr. Hoppe's office, and Mr. Hoppe was there, Mr. Howard, Dick Howard, was there, and I believe Mr. Tomlinson of Sound Control was there.* (Emphasis added.)

Q. What, if anything, was said by these people, if you remember, at that meeting? A. *Mr. Hoppe was upset, of course, that Flintkote Company was selling aabeta.* (Emphasis added.)

He said that he felt that we should have consulted him about appointing another acoustical contractor in the Southern California area, before selling an additional account.

Q. What did you say, if anything? A. *I told Mr. Hoppe that we did not have the authority to make any decisions, as to who was or who was not to be appointed as an acoustical tile contractor.* (Emphasis added.)

Q. Do you recall anything else that bears on this thing at that time? A. *Mr. Hoppe then, to continue that conversation, Mr. Hoppe wanted to know who was in charge at The Flintkote Company, that he could talk to.* (Emphasis added.)

Q. And what did you say? A. We told him that Mr. Harkins was. And he said he would like to talk to Mr. Harkins.

1114 (Cross-examination):

Q. So that when you and Baymiller got out to Coast Insulating you not only found Mr. Newport but you found Mr. Krause there, too, is that right? A. That is right.

1123-1125 (Krause, Direct):

Q. What was the occasion when you first learned of the activities of Messrs. Lysfjord and Waldron in business as aabeta company in the Los Angeles area? A. *One of my salesmen reported to me that we had lost a job to the aabeta company and I believe the general contract was Contracting Engineers. It was a market job.* * * * (Emphasis added.)

Q. What, if anything, did you do in connection with this, Mr. Krause? A. As I recall the job, it was a Flintkote specification, and our people had been working on the job, *and I immediately got on the phone and called the Flintkote people up because it was my understanding that they took the job on a Flintkote specification.* (Emphasis added.)

So I contacted the Flintkote office and tried to get in touch with Bob Ragland, and he was out of town, so I got hold of Sid Lewis, and I said, *"Mr. Lewis, have you opened another acoustical contractor in the Los Angeles area, or what is happening around here?"* It was my understanding that there were three acoustical contractors, *and we ended up with aabeta company, which is a new company, and I didn't even know who they were actually, with the Flintkote line.* * * *

Q. What did Mr. Lewis say to you in response to that? A. *Well, he became quite heated. I was rather amazed to find that we were customers and to have our manufacturers jump through the telephone at us, and it ended up by his telling me to go to hell. I will never forget that. I know that to be a fact.* (Emphasis added.)

1126:

Q. (*By Mr. Black*): Was anything said by Mr. Lewis with respect to what the company's action would be, if any? A. No, the only thing Mr. Lewis said that the Flintkote Company had the right to open up or close down any distributor that they wanted to. * * *

Q. Did you later have any discussions with the Flintkote people or any of their employees? A. Yes, sir.

1128:

* * * shortly after that Mr. Baymiller and Mr. Heller came to our office, and I happened to be there at the time, *and they came unannounced, and Mr. Baymiller, during the conversation, lost his temper in Mr. Newport's office and said that The Flintkote Company had a right to their own business and they could handle or see fit to give out any distributorship*, franchises; or take any away that they wanted. *And Mr. Baymiller and Mr. Newport both parted feeling pretty hot.* (Emphasis added.)

1139 (Krause Cross-examination):

Q. Now, as I recall your testimony, you stated that in your talks with Sidney Lewis and Baymiller and Heller that you expressed the idea that it was your understanding that Flintkote had agreed that there would only be three contractors in Southern California in the Flintkote line. Was that your understanding? A. That is correct, sir.

Q. *And that didn't have reference to any particular area in Southern California, it was just the fact that you understood there would only be three contractors down here?* A. *That is correct.*

Q. *And you made no specific objection as to San Bernardino or Los Angeles, it was a general objection that they put in a new contractor, was that right?* A. *That is correct, sir.* (Emphasis added.)

1142-1143:

Q. *Now, you stated that when Baymiller and Heller came in to see you two people, that is, you and Mr. Newport, they were very incensed. How did they express this anger?* A. *Well, Mr. Baymiller is quite a bombastic individual. He was incensed over the fact acoustical contractors or customers of The Flintkote Company should tell The Flintkote Company how to run their business.* (Emphasis added.)

Q. Well, in a way that is what you were doing, wasn't it? A. Well, we were—

Q. You were telling them to cut off a supplier and you objected their installing a supplier? A. It wasn't so much we were telling them to cut off a supplier. It was the fact they had opened a new supplier without advising any of us in our firm. * * *

Q. When you called Mr. Sidney Lewis, didn't you tell him you wanted something done about it right now? A. We didn't tell him he wanted something done about it right now. We just wanted to know why, what their new policy was.

Q. If Mr. Sidney Lewis testified you were very emphatic and you wanted some steps taken right now, immediately if not sooner, would you say he was wrong? A. I couldn't say.

1145-1146:

Q. Let's get to the Ragland meeting with you. When he came out to the Coast Company to see you, either a few days before or a few days afterwards, what did Mr. Ragland have to say? Let's take yours first. What did you tell Ragland? Much the same things as you told Baymiller? A. Well, with Ragland and myself it was more of a personal thing. We were paratroopers together; and I said, "Bob, it has always been our understanding that there would only be three acoustical tile

contractors appointed by the Flintkote Company as far as the Southern California area is concerned, why did you have to go ahead and appoint another one?" I said, "The least you could have done if you had decided to do it is to have told us ahead of time that that was going to be the Flintkote policy."

Q. What did Bob say? A. It was along that basis.

Q. And Bob just said they promised to cover Riverside for us too and that was our reason? A. He said that he really had nothing to do with it, that it was a decision of Mr. Harkins as to whether or not there would be another acoustical contractor.

1149-1150 (R. E. Howard, Direct):

Q. What was the first occasion that you had any knowledge or information with respect to the operation of the aabeta company in the acoustical tile field? A. I can't recall whether I was told that by one of the salesmen, our own salesman that heard someone else tell them, or whether I was told by the Flintkote people themselves or who. It is just very vague.

Q. Did you make any inquiry of the Flintkote people yourself with respect to aabeta company's operations? A. Yes.

Q. When did you do that if you can place the time approximately? A. Shortly after I heard that they were operating in the Los Angeles area.

Q. Whom did you call in the Flintkote Company? A. I believe Mr. Baymiller.

1151:

Q. What was said on that occasion by you, Mr. Hoppe, Mr. Baymiller and Mr. Heller, if you remember? A. Very little, so far as I am concerned. I had very little to say. I was more or less listening to what the other people were saying.

1152:

Q. What specifically that you now recall did Mr. Baymiller or Mr. Heller say? A. *Neither one of them would say a great deal, because they said at that time they couldn't make any decisions. They would have to go through their office, someone that could make a decision, and find out if anything was going to be done about it.* (Emphasis added.)

1153 (Cross-examination):

Q. Mr. Howard, prior to this conversation with Baymiller, the first one, was that the first time you contacted Flintkote with respect to aabeta's being in business? A. Yes; over the telephone I had called Mr. Baymiller or Mr. Heller; I can't recall which one, but I believe it was Baymiller.

1157-1158:

Q. You have heard this testimony about Mr. Baymiller being rather incensed at the Coast office. Was he incensed when he came over to your office? A. No, very quiet and calm. There was no excitement at all.

Q. And he didn't commit himself on whether they should be in San Bernardino or whether Flintkote would restrict them there or what Flintkote would do, did he? A. That is right. As I recall, he said he didn't know much about it, couldn't make any decisions.

Q. Though he expressed that he didn't know where they were to be or what they would do about it? A. That is right.

conspiracy, then the statements made by a co-conspirator, if made *during the existence of the conspiracy*, and *in execution of the common design*, were admissible against all conspirators. Schine Theatres v. United States, 334 U. S. 110, 117, 68 S. Ct. 947, 92 L. Ed. 1245; United States v. Gypsum Co., 333 U. S. 364, 393, 68 S. Ct. 525, 92 L. Ed. 746.

This conversation was introduced for the purpose of establishing that the act of termination was not equivocal, that it was an act in furtherance of the conspiracy, and that Flintkote had joined in that conspiracy. Excluding the evidence improperly introduced, no sufficient basis for the introduction of Conversation Number 3 was proved. Thus the foundation required to make the evidence admissible could only be established by the evidence itself. While much latitude is allowed in the order of proof establishing a conspiracy, as we have heretofore discussed, the proponent of the evidence must still lay a proper foundation.

It may seem anomalous that the proponent must establish the existence of the conspiracy by independent evidence before statements of alleged co-conspirators showing the existence and operations of the conspiracy is admissible. A cynic might observe that the law requires that the body be buried before the coffin is nailed. But the law has its reasons. The only conceivable basis upon which the admission of such unsworn and damaging evidence can be justified—the parties acted in concert, and each authorized or approved the other's actions—intrinsically necessitates an independent showing of the conspiracy. If the rule were otherwise, persons would go to jail or be held liable in damages solely on hearsay

evidence which they had no opportunity to impeach or refute.

There is a further reason why under the record as it existed before the trial court, and the manner and theory under which the case was tried, this Conversation Number 3 was inadmissible. The court had previously ruled (and we do not here pass upon the merits of that ruling) that the refusal of Flintkote to deal further with plaintiffs on February 19, 1952, marked the termination of the conspiracy.[22] If that be true, the statements of Krause were inadmissible against Flintkote, the alleged co-conspirator.[23]

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[22]The Court: . . . Now I haven't heard anything yet which would indicate a court's duty to depart from the rule that admissions of a conspirator, one conspirator made in the course of a conspiracy and in furtherance of it, are admissible against and binding upon the fellow-conspirators. The rule I refer to is the one that holds that in order to be in furtherance of a conspiracy, the act or declaration must be one which was made in the course of the conspiracy and not afterwards. I think that the date of the conspiracy ended as the closing date for the making of admissible admissions binding on other conspirators. It is certainly binding upon the person who makes them, but as to their being in furtherance of a conspiracy they can't very well further it after it is ended. And I think if your February 19, 1952 date of ending is the date which forecloses the admissions of persons other than the firm on trial and its own direct agents acting for it rather than acting for it as a conspirator——"

"Mr. Ackerson: Very well, your Honor."

"The Court: ——so if you have some holding of a court on that express question I will reopen the ruling, but unless you do have, I will not admit testimony of the type just alluded to."

"Mr. Ackerson: Statements or acts subsequent to the termination date of the conspiracy, February 19th?"

"The Court: Yes. That statements or acts of persons other than the defendant on trial, and its agents, that is, the agents of Flintkote, Flintkote a corporation rather than Flintkote a conspiracy."

"Mr. Ackerson: Yes." [Tr. 293, 294, 295.]

[23]Krulewitch v. United States, supra; Fiswick v. United States, 329 U.S. 211, 67 S. Ct. 224, 91 L. Ed. 196.

Third: Alleged Errors in Instructions, Other Than Damages.

We next consider the defendant's third ground of alleged error, relating to instructions. Specification 12, alleged error in instructions respecting damages, will be considered later. There remains specification of alleged errors (Appellant's Points 5 to 10 inclusive) in instructions with regard to: Flintkote's participation in the conspiracy; reasonableness of restraint of trade; conflicting instructions on injury to public; refusal to give defendant's instructions 24, 25, and 33; error in refusal of defendant's instructions on burden of proof (Defendant's, 14 and 42).

We have heretofore pointed out that the plaintiffs' instructions in this case were prepared for a trial against all named defendants, including those dismissed out prior to trial, and that counsel for both parties and the court had agreed that they should be re-cast. Unfortunately, such re-casting did not take place in every instruction. The court did carefully and properly instruct the jury.

> ". . . but there is only one defendant here. This complaint . . . was filed against many defendants. What has happened in this case with respect to the others is not of any concern to you. We are trying the case here today as to this one defendant." [Tr. 1239]

The court further charged that:

> "The Flintkote Company can be liable for refusing to sell acoustical tile to plaintiffs only if such refusal to sell was in furtherance of and as a consequence of knowing participation in an unlawful combination or conspiracy.

In other words, we come back to the old principle that if the Flintkote Company was acting entirely on its own, without conspiracy with the other defendants, then there is no cause of action."

[Tr. 1247] [See also, Tr. 1252]

This charge was essentially correct.

But the jury was also instructed as follows:

". . . However, the case here is one in which The Flintkote Company is accused of being a member of a conspiracy. The Flintkote Company or anyone else engaged in private enterprise may select its own customers, and in the absence of an illegal contract, combination or conspiracy may sell or refuse to sell to any person, including these plaintiffs, for any cause or for no cause whatever. *But under the anti-trust laws it cannot do so if there has been a conspiracy.*" [Tr. 1236] (Emphasis added)

Without interpretation this is an inaccurate expression of the law. It permits a recovery against a defendant who refuses to deal "if there has been a conspiracy;" *irrespective of whether or not the defendant then sought to be held participated therein.* Plaintiffs can only urge that it might be *inferred* that because of the first sentence (de-emphasized in Appellant's Brief), there was impliedly added to the last sentence the words: "in which Flintkote participated."

The confusion thus created was compounded by another instruction:

"If you are satisfied from all the evidence that any two or more of the defendants acted together for the purpose and with the effect of eliminating the com-

petition in the purchase, sale or installation of acoustical tile, then you may return a verdict against the defendants and in favor of the plaintiffs, provided the evidence actually shows preponderantly that plaintiffs were damaged by such acts and conduct." [Tr. 1245, 1246.]

Here the jury was authorized to return a verdict against the defendant *irrespective of whether or not the defendant ever participated in the conspiracy.* This goes to the heart of the defendant's theory of defense.

Finally, the jury was instructed that if they found certain essential facts existed, then

". . . your verdict should be in favor of plaintiffs as to each defendant whom you find to have knowingly participated therein." [Tr. 1245.]

And again, if they were satisfied that certain acts took place,

". . . then you may return a verdict against the defendants." [Tr. 1245.]

The given instructions were misleading and contradictory. They did not help the jury return a careful and thoughtful verdict. The instructions were not correct, and should not have been submitted nor read. However, defendant admits that no objection was made to these instructions at the time they were given, [Tr. 1257-1261] or before the jury retired. There thus exists the question as to whether defendant can take advantage, on this appeal, of the alleged error. *Rules of Civil Procedure*, (Rule 51.).

We recognize the fact that trial lawyers in some respects act at their peril, in requesting a revision of an

instruction once it has been given to a jury. It may be unduly emphasized in the jury's mind. Nevertheless, if the instruction is erroneous, objection must be made, and as the rule says, "stating distinctly the matter to which he objects and the grounds of his objection."

When a party fails to do this, he runs the risk that despite the error, he may be held to have waived it.

Because of other prejudicial error, to which exception was property taken, we need not here pause to re-consider the question of whether "plain error" in the giving of misleading instructions may be reviewed where no proper objection or exception was made at the trial.[24]

Neither was any specific objection made to the court's failure to give certain instructions requested by the defendant. (No. 24, 25, 26, 27, 28, 29, 30, 32 and 33). The court admittedly gave the substance of some of these. The trial court has a broad discretion in the emphasis it may direct to any legal position, or whether, after having spoken on the subject, it need or need not repeat the proposition in varying ways, as proposed by respective counsel. We believe the court clearly tried to fairly present both plaintiffs' and defendant's legal theories to the jury; and we hold that on this aspect of the case, he did so.

As to burden of proof, we agree with the trial court that many instructions were offered, that he selected one, and "did not wish," nor was he required, to repeat. No error was committed thereby.

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[24]Persons v. Gerlinger, 9 Cir., 227 F. 2d 337; Woodworker's Tool Works v. Bryne, 9 Cir., 191 F. 2d 662; Lynch v. Oregon Lumber Co., 9 Cir., 108 F. 2d 283.

Fourth: Alleged Error in Refusing to Grant a New Trial; in Instructions Relative to Damages; in Fixing Attorney's Fees; and in Crediting the $20,000 payment.

We now turn to defendant's fourth contention, concerning damages. Here there is no question but that the defendant objected, and took exception, to the theory of damages which went to the jury, and which governed the court's action thereafter.

Appellant contends that numerous errors were committed in respect to the ultimate amount of the judgment. Specifically, appellant asserts (A) the jury verdict was grossly excessive; (B) damages were awarded for a period of time beyond the permissible period; (C) the District Judge erred in determining the legal effect of The Covenant Not to Sue executed between appellees and others; and (D) the attorney's fees granted below and those sought on appeal are excessive. We will consider these points in order.

A. *Excessive Damages.*

At the outset appellees question this Court's power to review the denial of a new trial on the grounds of excessive damages. Regardless of what the rule may be in other circuits, this Court has repeatedly affirmed its authority to review such a denial. Cobb v. Lepisto, 6 F. 2d 128; Dept. of Water & Power v. Anderson, 95 F. 2d 577, cert. den. 305 U. S. 607; Southern Pacific Co. v. Guthrie, 180 F. 2d 295, 186 F. 2d 926, cert. den. 341 U. S. 904. And it may reverse the lower court's decision if it finds the verdict grossly excessive or monstrous. Southern Pacific Co. v. Guthrie, 186 F. 2d 295. Stated differently, however, appellant's contentions in the instant case actually challenge the sufficiency of the evidence to

support the jury verdict, a question of law, and one which this Court or any appellate court of ordinary jurisdiction has undoubted power to decide.

Appellees here sought damages for three separate and distinct kinds of injury to their business:

(1) Out-of-pocket expenses incurred in establishing a business in San Bernardino. These expenses consisted of sums expended for building rental, promotion and advertising, and trucking and utilities. Without dispute, they totaled $1,920.00. If we assume liability proven, the evidence supports without question an award as to this amount.

(2) Out-of-pocket expenses resulting from the increased cost of acoustical tile caused by appellees' inability to purchase their supplies from Flintkote. Appellees introduced evidence tending to show that during the period from January 1, 1952 to May 3, 1955, they paid $87,808.97 for acoustical tile obtained from persons other than Flintkote and that this represented an excess of $12,758.57 over that sum which Fintkote would have charged them for the equivalent quantity. The evidence on this point was conflicting and although it appears possible that some of the items included in the computation of the aggregate amount actually paid were not properly allocable to acoustical tile, that was a question for the jury's determination. Excepting the question as to the validity of the time period for which damages were here allowed, which we will later come to, no error appears in the record as to this theory of damages.

(3) Loss-of-profits which appellees would have realized had they been able to acquire acoustical tile from Flintkote on a direct basis. The total possible damages sus-

tained under items (1) and (2) is $14,678.57. Thus it is obvious that most of the award was based on loss-of-profits, and it is here that the evidence is frailest.

Initially, it should be noted that damages for all three kinds of injury alleged in the instant case are recoverable in the same action, if supported by competent evidence, and not all nor any two are necessarily mutually exclusive. Story Parchment Co. v. Paterson Parchment Paper Co., 282 U. S. 555, 51 S. Ct. 248.

Turning to the issue of lost profits, the sole evidence adduced relative thereto was the oral testimony of the plaintiffs and their accountant, as supplemented by written computations. [Plaintiffs' Exhibits 38 and 39.] An analysis of the qualifications of the witnesses as well as the testimony is essential to an understanding of the problem which confronts us.

Mr. Lysfjord testified that prior to the formation of the Aabeta Company, he had worked twelve years in the acoustical tile industry, which were evenly divided between installing and selling, the last five of which were spent as a salesman for the R. W. Downer Co. He stated that he "never concerned" himself with the financial position of that company and "had nothing whatever to do with the purchasing of materials" for it. In short, his activities were restricted to the sales facet of this business. He evidently was thoroughly acquainted with this part of the business. But it is apparent from his own testimony that he knew little, if anything, about the myriad problems entailed in the proprietary and managerial operations of an acoustical tile business. That Mr. Lysfjord was an able and experienced salesman is not disputed. That is one thing. That this record

qualifies him as an expert on business prognosis is quite another matter. His testimony bespeaks of great optimism, predicated not so much on economic reality as on his personal philosophy and enthusiasm.

> "I can't see any reason in my mind that I shouldn't be able to do as well for myself as working for somebody else. I surely would work as hard or probably twice as hard for myself as for anybody else." [Tr. 628.]

His partner, Mr. Waldron, demonstrated the same fervent hopes. His experience, too, had been confined to work as an applicator and then as a salesman before he embarked on this venture. Further, he admitted that he had had no previous experience in operating or owning any business; that in regard to his work at the R. W. Downer Co., he had never acquired any knowledge of its working capital or financial structure and, indeed, had never even examined its books. Despite this patent lack of business background, he testified that he fully anticipated annual profit increases, justifying his assumption on

> "Just normal expected increase in good will and sales, promotional work, ..." [Tr. 713.]

The accountant, Mr. Frank Hamiel, merely performed the mechanical function of computing the figures given him by plaintiffs.

What, then, were plaintiffs' estimates and upon what factual basis were they grounded? In essence, the computation of lost profits was based on the assumption that plaintiffs would make as much working for themselves in their first year of operation as they and their em-

ployer, R. W. Downer Co., made together from their sales in their best year working for that going concern; that thereafter, profits would increase as much as 50% annually. In other words, they thought that they could have sold a carload of acoustical tile per month in 1952; one and one-half carloads per month in 1953; and two carloads per month in 1954. The gross sales price of a carload was estimated at $18,000, with a 20% net profit or $3600 per carload. The 20% profit factor was derived from adding plaintiffs' 10% commissions to the 10% profit made by the Downer Co. on their sales. Thus, the total net profit for each partner was approximated at $21,600 in 1952; $32,400 in 1953; and $43,200 in 1954, for a cumulative total of $97,200 each, from which actual earnings were deducted to leave a net loss of anticipated profits of $75,788.50. It was also shown that plaintiffs actually made a net profit of 5% of gross sales in 1952; 11% in 1953; and 5% in 1954. (This variance alone is of peculiar significance to the soundness of plaintiffs' theory of damages.)

The foregoing represents the sum and substance of plaintiffs' evidence on this issue. The omissions are manifold and significant. Nowhere in the record is there any substantial evidence of the state of the industry during this three year period. There is no evidence that plaintiffs would probably have obtained more business if they could have purchased Flintkote tile on a direct basis in that no showing is made of the existence or availability of such business or plaintiffs' ability to undertake additional work. We know only that business was "very competitive" and that plaintiffs encountered difficulty in disposing of the one and one-half carloads of Flintkote tile which had been supplied them. Financially,

plaintiffs went into business with a relatively small capital investment ($6,000), with hopes of increasing their capital account by plowing profits back into the enterprise.

A study of the adjudicated cases in this area readily dispels any impression that this question of damages is governed by an application of the common law rule of reasonable certainty. The cases have long since departed from this rule in antitrust litigation. (Story Parchment Co. v. Paterson, supra, at 565.) Just how far they have gone in imposing the risk of uncertainty on defndants we must now consider.

Preliminarily, it should be observed that the reasons underlying the evolutionary trend toward liberality in proving damages are grounded in logic and sound policy. Two principal factors have influenced the courts. First, the self-evident intangible nature of the subject matter. To ascertain what would have been is as difficult as trying to determine what should be. In the cryptic words of Judge Wyzanski, in a private antitrust action, "You can't go to a book and look for the answer." Cape Cod Food Products v. National Cranberry Ass'n., 119 Fed. Supp. 900, 910. Second, the legal maxim that a wrongdoer should not profit by his wrong. In light of the intrinsic uncertainty surrounding this problem, the responsibility for which lies in large measure with the defendant found liable, it has long been felt that this presents an ideal situation for application of that doctrine.

As stated by the Supreme Court.

> ". . . a defendant whose wrongful conduct has rendered difficult the ascertainment of the precise damages suffered by the plaintiff, is not entitled to complain that they cannot be measured with the same

exactness and precisions as would otherwise be possible."

> Eastman Kodak Co. v. Southern Photo Co., 273 U. S. 359, 379. Cf. Story Parchment Co. v. Paterson Co., supra, at 563; Bigelow v. RKO Pictures Inc., 327 U. S. 251, 264-5.

It is in this setting that the modern rule has developed.

We take it that the controlling rule today is seeking damages for loss of profits in antitrust cases is that the plaintiff is required to establish with reasonable probability the existence of some casual connection between defendant's wrongful act and some loss of anticipated revenue. Once that has been accomplished, the jury will be permitted to "make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly." Bigelow v. RKO Pictures Inc., supra, at p. 264. The cases have drawn a distinction between the quantum of proof necessary to show the *fact* as distinguished from the *amount* of damage; the burden as to the former is the more stringent one. In other words, the *fact* of the injury must first be shown before the jury is allowed to estimate the *amount* of damage.

The Supreme Court articulated this dichotomy of damage proof in the Story Parchment Co. case.

> "It is true that there was uncertainty as to the extent of the damage, but there was none as to the fact of damage; and there is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage, and the measure of proof necessary to enable the jury to fix the amount. The rule which precludes the recovery of uncertain damages applies to such as are not the

certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect to their amount."

282 U. S. 555, 562. Cf. Bigelow v. RKO Pictures Inc., supra.

Although there may be instances where this distinction does not advance the resolution of a particular controversy, it here serves a useful purpose in accentuating the paucity of evidence of lost profits.

There are three chief types of evidence which the decisions have approved as the basis for the award of damages. (1) Business records of the plaintiff or his predecessor before the conspiracy arose.[25] (2) Business records of comparative but unrestrained enterprises during the particular period in question.[26] (3) Expert opinion based on items (1) or (2).[27]

In all three important Supreme Court decisions in this field, the jury verdict was sustained on the basis of evidence of prior business success by either the plaintiff or his predecessor.[28] There is, of course, no previous

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[25]Frey & Son v. Welch Grape Juice Co., 4 Cir., 240 Fed. 114; William R. Rankin Co. v. Associated Bill Posters, etc., 2 Cir., 42 F. 2d 152.

[26]William Goldman Theatres v. Loew's, 69 Fed. Supp. 103, affirmed 3 Cir., 164 F. 2d 1021, cert. den. 334 U.S. 811, 68 S. Ct. 1061, 92 L. Ed. 1742; Bordonaro Bros. Theatres v. Paramount Pictures, 2 Cir., 203 F. 2d 676; Milwaukee Towne Corp. v. Loew's, 7 Cir., 190 F. 2d 561; Twentieth Century-Fox Film Corp., et al. v. Brookside Theatre Corp., 8 Cir., 194 F. 2d 846, cert. den. 343 U.S. 942, 72 S. Ct. 1035; Theatre Investment Co. v. RKO Pictures Inc., 72 Fed. Supp. 650.

[27]Frey & Son v. Welch Grape Juice Co., supra; William R. Rankin Co. v. Associated Bill Posters, supra; Bordonaro Bros. Theatres v. Paramount Pictures, supra.

[28]Eastman Koadak Co. v. Southern Photo Co., supra; Story Parchment v. Paterson Co., supra; Bigelow v. RKO Pictures, Inc., supra.

business history of a comparable nature in the case at bar. The absence of such history is not fatal, for even total exclusion from business is actionable, if substantial evidence of damage be adduced.[29] Here, though, plaintiffs did endeavor to introduce a type of prior business history. That is, they sought to show by their past performance with the Downer Co. what their expected profits would likely be in a new business. However, all they showed was evidence of their highest commissions during an unspecified period and what the company's profits on their sales had been. They selected only their segment of the business. There is no evidence of the over-all records of Downer Co.; nor evidence whether the company prospered as a whole; or whether it took more or less profit on plaintiffs' sales to compensate for gains or losses in other parts of the business. Further, there is no evidence of size of the Downer Company, or its financial resources as compared to that of the Aabeta Company. Indeed, plaintiffs conceded that they knew little about the affairs of the Downer Company.

Though the Supreme Court expressly withheld ruling on the validity of comparative figures in the Bigelow case,[30] subsequent lower court decisions in the motion picture cases have accepted them where similarities were shown.[31] Where no basis for comparison was shown such evidence has been rejected.[32]

Here no attempt whatsoever was made to introduce comparative figures of other acoustical tile businesses

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[29]William Goldman Theatres v. Loew's, supra.

[30]Twientieth Century-Fox Film Corp. et al. v. Brookside Theatre Corp., supra, 327 U.S. at p. 266.

[31]See note 30, supra.

[32]Wolfe v. National Lead Co., 9 Cir., 225 F. 2d, 427.

during the period in issue. The record is devoid of any evidence of what any other similar business did during any period. The references to the Downer Company business are fragmentary. There is no evidence of what established firms made during the period in question or what newly-formed companies made in their formative years during any period.

We have only the plaintiffs' own estimate. Yet their own testimony discloses their total lack of managerial experience and their lack of knowledge of the financial operations of an acoustical tile business.

The decision in William H. Rankin Co. v. Associated Bill Posters, supra, relied upon by appellees, does not support their position, for as explained by Judge Chase in Baush Mach. Tool Co. v. Aluminum Co. of America, 2 Cir., 79 F. 2d 217, 227, the Rankin decision (which he also authored),

> ". . . upheld the admission of an estimate of lost profits, but there was a proper basis for estimate in that case afforded by a period of profitable operation prior to the defendants' unlawful interference which prevented a continuance of the former success."

In the Baush case itself, the court held inadmissible the testimony of plaintiff's president estimating future profits.[33]

We have reviewed the cases most favorable to appellees, but we have been unable to discover any case so fraught with uncertainty as the one at bar, which upholds a jury verdict. This Court only recently cautioned against giv-

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[33]Cf. Chiplets, Inc. v. June Dairy Products Co., 114 Fed. Supp. 129, holding conclusionary estimates of claimant's officers insufficient evidence upon which to ground judgment for alleged loss of profits.

ing "judicial blessing to a decision based upon speculation, surmise and conjecture." Wolfe v. National Lead Co., 225 F. 2d 427, 434. There the District Court's dismissal of an action because of failure of proof of injury was affirmed.

We recognize the fact that as we examine this feature of the case, injured plaintiffs and a wrongdoing defendant face the court. In such a context the record will not ordinarily be searched with a microscopic eye. Yet something better is required to sustain a jury verdict than a mere interested guess.

As stated by the Supreme Court in Bigelow v. RKO Pictures Inc., supra,

> "In such a case, even where the defendant by his own wrong has prevented a more precise computation, the jury may not render a verdict based on speculation or guesswork."

Where, as here, the sole evidence as to loss of profits is the testimony of the plaintiffs, both inexperienced in business operations, stating what they had expected to make during the infancy of a newly-created enterprise based on inaccurate computations[34] of the most money

[34]The computations of plaintiff's average monthly 1951 earnings with the Downer Co.—the base figure in all their tabulations—are patently incorrect and distorted. They reflect not only commissions earned during the base year, 1951, but also include undisclosed sums earned in 1950, but not paid until 1951. For example, Lysfjord's purported average monthly earnings were $1,580.00. This figure was arrived at by adding the total amount he received during 1951, $12,739.85, to that received in 1952 for sales made in 1951, $6,221.00. That sum was then divided by twelve. It would appear basic that if there was some time lag between sales and compensation therefor, if the 1950 sales were to be included in the aggregate figure for 1951, then the 1952 sales should be excluded. But this was not done. Both were included on the rationalization that an accurate allocation among the particular years could not be made. This made for a basic inaccuracy of at least 50%.

they had made working as salesmen for an established firm in years preceding those in question, with no attempt having been made to establish a comparison as to either the businesses or the years; the jury verdict predicated on such evidence cannot stand.

We do not hold nor imply that a jury verdict could not be upheld under any circumstances solely on the testimony of the plaintiffs. We hold only that if they are qualified to make these estimates, the record must show their competency and the factual basis upon which they rest their conclusions.

B. *The Period of Time for Which Damages Were Recoverable.*

The court below, over strenuous objections, admitted evidence and instructed the jury that it could award damages for injuries incurred up to the date the trial began. Appellant urges that the proper cut-off date is the day the action was filed. The original complaint was filed on July 21, 1952. The amended complaint was filed on March 23, 1953. The trial commenced on May 4, 1955. No special verdict was rendered apportioning the damages to any particular segment of time. Thus, it is apparent that this question permeates the entire damage award in a substantial manner and if error be found, it is perforce prejudicial.

Two well-settled propositions of law govern the determination of this issue. Succinctly stated, they are, that a plaintiff is entitled to recover all damages for injuries proximately caused by wrongful acts committed *prior* to the filing of the action;[35] and conversely, a plaintiff is

[35]Lawlor v. Loewe, 235 U.S. 522, 35 S. Ct. 170, 59 L. Ed. 341.

not entitled to recover damages for injuries resulting from wrongful acts committed *subsequent* to the filing of the action.[36] The time of the wrongful act controls the measure of damages. Thus, it becomes necessary to ascertain whether plaintiffs' injuries were caused by a prior act or whether they are attributable to protracted conduct and repetitive acts which continued beyond the date this action was filed.

It is appellees' position that there was only one wrongful act in the instant case, i.e., "the act of terminating permanently appellees' source of supply" on February 19, 1952. It is true that Mr. Thompson's declaration made that day that Flintkote would no longer sell to plaintiffs was the only overt act of the alleged conspiracy charged against the defendant now sought to be held. Thereafter, say appellees, a continued refusal to sell in execution of the conspiracy could be implied from the already manifested refusal. Appellees' argument contains an inherent dilemma. If their position be that the February, 1952, announcement marked the termination of the alleged conspiracy, then any subsequent refusal to sell, express or implied, would be a lawful act and not actionable. If, on the other hand, we were to assume that the conspiracy did not end on that day, we would have to infer a continued refusal to sell; otherwise, plaintiffs could not succeed, for the record fails to show any attempt made by plaintiffs after February 19, 1952, to purchase acoustical tile from Flintkote.

Appellees' characterization of the refusal on February 19, 1952, as a "*permanent*" and fixed act is a mere con-

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[36]25 C. J. S., Damages, Section 193, p. 908.

clusion, and more important, incorrect. In the very nature of things, the announcement lacked finality. It could mean no more than that Flintkote, on that day, was absolutely and unalterably opposed to future dealings with the plaintiffs. Appellees confuse unequivocality with permanency. Flintkote's position was neither irrevocable nor immutable. It was under no legal duty to adhere to that position. On the contrary, it was at all times completely free to reconsider and modify its views.

This cause of action is founded on an act of a continuing nature. The express refusal to deal constituted no more than a refusal to deal at that time. Plaintiffs' injuries were not caused just by the announced refusal but rather resulted from the explicit refusal coupled with the implied persistence in the announced course of conduct. Indeed, appellees themselves recognized the continuing nature of the conspiracy for in their brief they assert that:

> "At the time of trial it is clear that appellees . . . were still under the competitive limitations resulting from the conspiracy."
>
> [Appellees' Brief, p. 108]

"[A] conspiracy . . . . is in effect renewed during each day of its continuance." United States v. Borden Co., 308 U. S. 188, 202. Accordingly,

> "Each time the plaintiff's interest is invaded by an act of the defendants, he has a new cause of action. For that particular invasion he is at once entitled to recover as damages, not only for the injuries he suffers at once, but also for those he will suffer in the future from that particular invasion, including what he has suffered during and will suffer after the

trial. Lawlor v. Loewe, 235 U.S. 522, 35 S. Ct. 170, 59 L. Ed. 341. But he cannot at once recover for anticipated invasions, even though they are of the same general character of as those he has already sustained." Momand v. Universal Film Exchange, 43 Fed. Supp. 996, 1006.

A case almost on all fours with the instant case is Connecticut Importing Co. v. Frankfort Distillers, 2 Cir., 101 F. 2d 79, which also involved a private antitrust action under the Sherman Act. There the plaintiff, a distributor, alleged a conspiracy between defendants, other distributors and the manufacturer, Frankfort, to maintain fixed prices; its refusal to join the conspiracy; and the consequent refusal by Frankfort to supply plaintiff with Frankfort products. The trial judge restricted damages to those sustained before the action was brought and on appeal the Second Circuit, addressing itself to the precise question before this Court, held,

> "Neither do we find any error on the plaintiff's appeal. The recoverable damages were only those sustained by the plaintiff from the time the cause of action accrued up to the time the suit was brought. Frey & Son, Inc. v. Cudahy Packing Co., D. C. 243 F. 205. Damages which accrue after the suit is brought cannot be recovered in the action unless they are the result of actions done before the suit was commenced. Lawlor v. Loewe, 235 U. S. 522-536, 35 S. Ct. 170, 59 L. Ed. 341. Here the plaintiff's damages, if any, after the commencement of the suit were due to continued refusal or refusals, in furtherance of the conspiracy, to supply it with the Frankfort products after that time. The unlawful

acts which would give rise to such damages had from their nature to be committed in carrying out the conspiracy after the suit was brought. It would be impossible to predict how long such a conspiracy would remain in existence or how long the refusal to sell to the plaintiff would continue and even if such damages could, in a sense, be treated as the result of refusing to supply before suit was brought, they would be purely speculative."

101 F. 2d at p. 81.

In Frey & Son v. Cudahy Packing Co., supra, where the identical question was again in issue, the Court stated:

"In this case the only damage proved by the plaintiff was the loss of profits it would have made on resales of Old Dutch Cleanser, if it had been able to buy Old Dutch Cleanser at the price at which other jobbers could obtain it. Such damage is a damage which occurs from day to day, and the damage on one day is not the necessary result of an act done by the defendant at an earlier date."

Cf. Savannah Theatre Co. v. Lucas & Jenkins, 8 F. R. Serv. 34.12, Case 2 (S. D. Ga. 1944).

The decision cited by appellees, Twentieth Century-Fox Film Corp., et al. v. Brookside Theatre Corp. supra, is not contrary. In that case defendants' unlawful practices compelled plaintiff to sell its theatre business to a corporation controlled by the defendants. Among its assets was a fifteen year leasehold interest in the theatre. The court held that the jury could properly consider evidence of the theatre's profits during that period, although they accrued after commencement of the action, as one

factor in determining the extent of injuries suffered by plaintiff as the result of the wrongful deprivation of its right to continue business.

The Brookside case is illustrative of the very distinction between the past and recurring act situation; that action for the destruction of plaintffi's business is analogous to an ordinary tort claim for a broken arm. In such instances, the causes of the plaintiff's injury have ceased to exist; only the effects remain. Here, though, the plaintiffs' injuries resulted from repetitive causes, the day-to-day implied refusal to sell to them. Both the cause and the effect continued. Yet there always existed the possibility that Flintkote would change its position. Thus there was no assurance of the continuation of causal acts beyond any particular day.

Appellees assail the limitation of damage rule on its merits, but we find no compelling reasons for discarding so late in the day such a well-established rule. Not only the need for preserving some semblance of certainty in the law, but also the relatively simple procedural method of averting the time limitation pitfall dictates this result.

The proper procedure to be followed in seeking recovery for injuries caused by acts occurring after the filing of the action is to file a separate suit, as was done in Bordonaro Bros. Theatres v. Paramount Pictures, supra, or a supplemental action, Bigelow v. RKO Pictures Inc., supra, or as the administration of justice dictates upon the remand of the instant case, by a supplemental complaint.

The absence of any acceptable basis for segregating the damage award makes it unnecessary to consider whether the amended complaint, a superseding pleading, could be employed to sustain an award through March 23, 1953.

Whether it did or did not would not affect our disposition of this issue.

C. *The Covenant Not to Sue, Vis a Vis Damages.*

On July 31, 1953, after the action was filed but before trial, the plaintiffs executed an agreement denominated "Covenant Not to Sue" with certain named co-conspirators other than Flintkote. By the terms of the agreement the plaintiffs agreed to withdraw their action against the covenantees in exchange for the sum of $20,000.00, expressly reserving therein all rights against defendant Flintkote.

The question presented is whether the $20,000 should be subtracted from the actual damages fixed by the jury verdict ($50,000) before said damages are trebled, or whether the award should be first trebled and then the $20,000 deducted from the trebled amount of $150,000. The former method produces a $90,000 judgment while the latter method results in a $130,000 judgment, or a difference in dollars and cents of $40,000.00.

The parties stipulated that all facts concerning the amount and effect of said covenant should be withheld from the jury and the question left to the determination of the District Judge. He decided that the jury verdict should be trebled and then the aggregate sum diminished by $20,000.

So far as our research reveals, this is a question of first impression for an appellate court.[37] Nevertheless, the

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[37]However, another District judge in an unreported case, Winekler & Smith Citrus Products Co. et al. v. California Fruit Growers Exchange, decided March 5, 1956, reached the same conclusion as did the court below.

resolution of it clearly lies in the application of firmly rooted principles of joint liability and the manifest objectives of the antitrust laws in general and the treble damage provision in particular.

The germane portion of the covenant provides,

> "That the sum of Twenty Thousand Dollars ($20,000) paid herein to the covenantors as consideration for the execution of this covenant not to sue does not represent to covenantors and shall not be construed as full compensation for the alleged damages claimed to have been suffered by the covenantors in their original complaint and in their first amended complaint, but is only *partial compensation* therefore, . . ."

The meaning of the italicized words is at best inconclusive. However, two conclusions can by inference be drawn from the document. First, it was not intended to be a release or to constitute full compensation. Second, the precise import of the treble damage statutory provision on the final settlement cannot be ascertained with scientific accuracy, but it can hardly be doubted that the spectre of potential three-fold liability influenced the negotiations.

The treble damage section reads as follows:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any District Court of the United States—and shall recover three-fold the damages by him sustained and the costs of suit, including a reasonable attorney's fee."
>
> 15 U. S. C. A. §15.

Thus, pursuant to congressional fiat, the jury award is trebled. Here the jury verdict placed the actual damages at $50,000. Superimposing the statutory sanction, the total collective liability for the alleged violation is $150,000.

Flintkote, if a co-conspirator, would be jointly and severally liable under well-settled principles of law for the entire amount if (1) the plaintiffs had successfully prosecuted any or all of the other co-conspirators, or (2) no jurisdiction could be acquired over the other alleged offenders and consequently only Flintkote was sued. Accordingly, the settlement does not impose an additional burden on Flintkote, but rather serves only to militate against its liability. The question is to what extent should it do so?

Irrespective of the nature of the cause of action, a plaintiff is entitled to one full satisfaction of his claim in an action against joint defendants.[38] In the case at bar, as it was tried partly by jury and partly by the court, and assuming there was no error in the introduction of evidence, such satisfaction would not be achieved by the award of any sum, which added to the settlement sum, did not total $150,000.

We are told that the treble damage provision is a unique statutory penalty, and therefore the pro tanto reduction should be made from the compensatory verdict itself. The non-compensatory share of the award is akin to the award of exemplary or punitive damages. In the case of punitive damages joint tortfeasors are liable

[38]Davis v. Lawhon, 186 Ark. 51, 52 S. W. 2d 887.

for the entire amount, not merely the compensatory part.[39] Further, a niggardly construction of the treble damage provisions would do violence to the clear intent of Congress. The private antitrust action is an important and effective method of combatting unlawful and destructive business practices. The private suitor complements the Government in enforcing the antitrust laws. The treble damage provision was designed to foster and stimulate the interest of private persons in maintaining a free and competitive economy.[40] Its efficacy should not be weakened by judicial construction.

Moreover, a contrary result would put a premium on litigation and discourage settlements. It is not the policy of the law to encourage litigation at the expense of compromise.

The collective liability for the alleged conspiracy as found at this trial, was $150,000. If no error had been committed, this is the amount which plaintiffs should have received. The plaintiffs having already received $20,000, it was proper to deduct that sum from the trebled amount. Any other method would have resulted in plaintiffs receiving less than the whole to which they were entitled.

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[39]Reizenstein v. Clark, 104 Iowa 287, 73 N. W. 588; Waggoner v. Wyatt, 43 Tex. Civ. App. 75, 94 S. W. 1076. See also, Washington Gas-Light Co. v. Lansden, 172 U.S. 534, 553, 19 S. Ct. 296, 43 L. Ed. 543.

[40]Lawlor v. National Screen Service, 349 U.S. 322, 329, 75 S. Ct. 865, 99 L. Ed. 1122; United States v. Borden Co., 347 U.S. 514, 74 S. Ct. 703, 98 L. Ed. 903; United States v. National City Lines, 334 U.S. 573, 68 S. Ct. 1169, 92 L. Ed. 1584; Karseal Corp. v. Richfield Oil Corp., 9 Cir., 221 F. 2d 358; Maltz v. Sax, 2 Cir., 134 F. 2d 2; Weinberg v. Sinclair Refining Co., 48 Fed. Supp. 203.

D. *Attorney's Fees; Below and On Appeal.*

The holding that there was prejudicial error in this case, requiring reversal, renders unnecessary a consideration of the arguments advanced concerning the propriety of the amount awarded as attorney's fees, and of the sum requested for legal services performed in connection with this appeal. Baush Mach. Tool Co. v. Aluminum Co. of America, supra; Paramount Film Distributing Corp. v. Village Theatre, 10 Cir., 228 F. 2d 721.

The judgment is reversed and the cause remanded for further proceedings not inconsistent with the views expressed in this opinion.

STEPHENS, *Circuit Judge,* Concurring.

I concur with the opinion insofar as it treats of the subject of damages. I express no opinion as to the rulings upon the objections to the evidence.

(Endorsed:) Opinion and Concurring Opinion. Filed Mar. 29, 1957.

Paul P. O'Brien, Clerk.

APPENDIX B.

Defendant's Testimony Re Alleged Prejudicial Hearsay Evidence Not Considered in Opinion of Circuit Court of Appeals.

Admission, partial opening statement by Black at commencement of case:

"Most of what Mr. Ackerson has said about the industry generally, the nature of the product, the number of people engaged in industry are not in dispute * * *" [R. 183].

"It is not denied that there were complaints made by the other Flintkote dealers in the area, that these people, * * * were competing into this area and competing on the same line of tile." [R. 184.]

490:*

The Witness: Well, Mr. Baymiller stated that there was considerable pressure brought to bear.

Then Mr. Thompson interjected his opinion, or his statement, I should say—I can't use the word "opinion." I guess—that it was completely out of their hands, and that would be Mr. Baymiller and Mr. Thompson, and that the higher-ups in their company had instructed them that Flintkote would no longer sell the aabeta company acoustical tile.

Lysfjord on Termination Meeting:

487:

Q. (By Mr. Ackerson): Now, we were progressing yesterday, Mr. Lysfjord, on your contracts with representatives of The Flintkote Company.

Will you describe how and under what circumstances your supply of Flintkote tile was terminated? * * *

A. I received a call at the Downer Company to meet Mr. Ragland and parties that he was to bring with him at the Bell address. * * *

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*All references to page numbers refer to Record numbers.

Mr. Thompson said that they were very sorry but from this time on they were unable to supply us with Flintkote tile. * * * (Emphasis added.)

And then I believe Mr. Waldron mentioned, "I guess the pressure started to work a little bit more than you anticipated and that you are becoming worried about it. * * *

Q. Was anything else stated during this period, any other conversation with respect to your business or otherwise? A. Well, Mr. Waldron again mentioned that he was quite surprised that the question that we all anticipated was great enough that it would influence the Flintkote Company. And Mr. Baymiller admitted that there had been a considerable amount of pressure placed on them.

Mr. Black: That is objected to as calling for a conclusion of the witness.

The Court: The words beginning with "admitted" and all the rest of the answer from that word on is stricken.

(Note: no objection whatever on hearsay, agency or otherwise.)

662:

Black's opening statement at commencement of defendants-case [R. 733 *et seq.*]:

"Now sometime in the early part of February the Flintkote people received a complaint from a Mr. Krause of the Coast Insulating Products, and also about the same time from a Mr. Howard of the R. E. Howard Company. In general the basis was that here were some people that were in the Los Angeles territory that Flintkote hadn't notified either Howard or Krause about adding another account in the area, and they didn't think that was a very handsome way to treat them when they had been dealing all this time on the basis that there were three accounts in the area here, and how come adding

another one here? What is the idea back of this? What are you doing this for without notifying us? Do you think that is a fair way to treat us? *Mr. Krause apparently became rather vehement on the subject.* (Emphasis added.)

* * * Mr. Krause talked by telephone to Mr. Lewis of the Flintkote Company.

Mr. Lewis is an assistant in the sales department in this division. Mr. Krause did not come to the Flintkote office. * * *

Later Mr. Baymiller and Mr. Heller called on Mr. Krause and then on Mr. Hoppe and on Mr. Howard, telling each of these people "that this situation would be looked into by Flintkote, and that they would make their own decision about it." [R. 774 *et seq.*]

Defense witness Ragland testified on direct [R. 812]:

Q. Prior to the termination did you ever see Mr. Krause at the Flintkote office? A. No, sir.

Q. Did you see him anywhere else prior to the termination? A. I visited his office.

Q. When did you visit his office? A. During that week of—when I was directed by Mr. Harkins to investigate these various rumors.

Q. Did he pound on the desk or shout at you at that time? A. No, he was—expressed his disappointment in me.

The Court: What did he say?

The Witness: He said that he was shocked to think that we would start a fourth account in Los Angeles, without at least telling him, or advising him. * * *

Q. Did you see Mr. Howard about that time? A. I saw him during that week, too. * * *

Q. Did you see Mr. Hoppe at that time? A. Yes, sir.

Q. Where did you see him? A. In his office.

945 (Baymiller on defense—direct):

Q. Do you recall anything said at all about objections? A. Yes, I believe Mr. Lysfjord or Mr. Waldron, one of the two of them—I don't recall which—anticipated that we would have objections from other customers. * * *

949:

Q. Prior to the time of severing that relations, what information was brought to you that bore on the plaintiffs' activities, that later led to that decision on your part? A. Most of the information that I received in regard to the—any breach of agreement, which might have been going on at that time came to me second-handed through Mr. Lewis.

Q. Who is Mr. Lewis? A. He is Mr. Harkins' assistant, of the manager of the building materials division. * * *

Q. What did that consist of? A. Well, I made a call at one, two—at a couple of our Los Angeles customers there.

Q. Why did you make those calls? A. *I made those calls at the request of Mr. Lewis.* * * * (Emphasis added.)

Q. Whom did you see first in that regard? A. If my memory serves me correctly, I saw Mr. Newport of Coast Insulation first.

951:

Q. Where did you see Mr. Newport? A. At Mr. Newport's office.

* * *

Q. Did you call on any of the other people at that time that dealt in Flintkote acoustical tile? A. Yes, I called on Mr. Howard and I called on Mr. Hoppe of the Sound Control Company.

APPENDIX C.

Expert Qualifications and Damage.

In defense counsel's Opening Statement prior to commencement of defendant's case [R. 773] Mr. Black made the following admissions:

"It was arranged at that meeting also for financial data to be prepared and to be presented to the company, and it was agreed that these matters would be taken up with Mr. Harkins who had the final decision.

Mr. Frank Harkins was at the time the manager of the building materials division for the Flintkote Company in the eleven western states and he was the man who would have the final decision as to the choosing of outlets of this sort for the sale of acoustical tile.

So a meeting was arranged between the plaintiffs and Mr. Harkins at the Flintkote office. At that meeting Mr. Thompson was present, Mr. Ragland was present, * * *

Mr. Harkins then, in effect, accepted the two plaintiffs as Flintkote distributors, suggested that they talk to the credit manager, which was done. A Mr. McAdow interviewed them, and the meeting thus terminated with the understanding that the plaintiffs would be Flintkote products outlets * * * [R. 771-772.]

The Witness: Yes, Mr. Thompson wanted [94] us to continue with the people we had been doing business with.

"The Court: What did he say?

Q. (By Mr. Ackerson): What did he say? That is what we want, Mr. Waldron, and not your interpretation of what he said. The words he used, as near as you can remember. A. He wanted us to be, or, asked us if we could continue selling the volume we were selling at that time with the people that we knew here in Los Angeles.

And we assured him we could.

Q. Very well. A. Am I clear there, by the way?

Q. Did you ever have a conversation with Mr. Ragland concerning any objections to your going into business? A. To going into business?

Q. Or continuing in business? Did you ever discuss a subject like that with Mr. Ragland? A. Oh, yes, many times. Not many times, but there were times when he could stop by our shop, and we would go to the nearest cafe, which was a Stan's Drive-in I believe, [116] and we discussed the chances of the opposition, or I will say the competition, of being particularly perturbed and angry when they learned that we were in business.

And he knew that.

Mr. Black: Just a moment. What did he say?

The Witness: Pardon me.

Q. (By Mr. Ackerson): What did he say? A. Mr. Ragland would say that there is no reason to worry about it, that The Flintkote people will back up their work."

(No objection to here by defendants.)

441 (testimony of Lysfjord):

Q. Did he give you any encouragement, if he did, or just what he told you? A. He said, "I will do everything in my power to get acoustical tile for you because I think you would do a good job for us but I can't tell you anything at this time one way or the other." [See also 443-459.]

444:

Q. Now proceed. I am sorry I interrupted. What was said and what was done? A. Well, Mr. Ragland introduced me to Mr. Baymiller and said "This is the fellow that I had in mind for handling our acoustical tile."

445:

Q. Did Mr. Baymiller at that time inquire into your experience, if you recall? A. Well, rather superficially, just that Ragland said I had done a very good job in selling in the area and he was aware of it because at one time he was a competitor of mine and that he—I keep saying "he"; I should use names—Bob Ragland said again he was trying every effort on his part [343] to get a line for us in the Los Angeles area, and again Mr. Baymiller mentioned, "Well, I really can't say for myself because we have to clear through the home office." [344.]

446:

Q. When was the next time you had a meeting with Flintkote representatives? A. A matter of a week or two later at the same place.

Q. Who attended that meeting? A. Mr. Waldron, Mr. Baymiller, Mr. Ragland, Mr. Thompson and myself.

Q. What time of day was that? A. Lunch.

Q. You said it was at the same place? A. Yes. [345.]

* * *

Tell us what happened at this second meeting, Mr. Lysfjord. You have five of you present. It is lunch hour. If you can reconstruct, the best you can to your recollection, tell us what happened, what was said. * * *

447:

* * *

A. Well, at this time Mr. Thompson seemed to be —should I say the monitor—in any case, he did the talking. And we just listened. He asked quite a few questions.

Q. What did he ask? What did he say? A. Well, probably again the same as Mr. Baymiller, the background I had had in the field and the ability that I had in selling.

Incidentally, he said, "It is very nice for you to tell me you are pretty good. Let me see what you have done."

And that is why I mentioned the phone call, because at the time Mr. Ragland mentioned if I had anything that could prove the fact I had been selling pretty well in the area it would be well if I brought it along.

Q. Did you bring it along? A. I brought a series of contracts that I had in my possession at that time for close to $40,000.00 worth of work. [347]

448:

Q. That was $40,000.00 worth of work you had sold for the Downer Company? A. Well, I don't quite like to say for the Downer Company. I sold it for myself and we, in turn, would work together on the job.

Q. But the Downer Company, they were contracts which the Downer Company was to perform as a result of your work? A. Yes, sir.

* * *

449:

A. I don't think Mr. Ragland even said a word. However, Mr. Baymiller mentioned that he thought perhaps that I would probably make a good man for his company."

450:

A. Well, Mr. Thompson said that he felt quite sure that we would be acceptable to his company as a distributor [350] for him or for them in the Los Angeles area, if we promised to cover, along with the Los Angeles area, the San Bernardino and Orange County area. But that the final say-so would depend on whether we had a financial statement large enough for acceptance to their credit manager.

He instructed us to prepare one and bring it to The Flintkote Company, and that they would call us in a short time and tell us exactly what the verdict was or what their opinion was.

But we were led to believe—we weren't even only led to believe, but he told us we had a hundred per cent chance of being their distributor.

454:

Q. Then what occurred? A. Mr. Thompson told us, Waldron and myself, that we had been accepted as a Flintkote dealer, that they hoped that we could work amicably in the future, and what did our plans entail at that particular time.

Q. Well, tell us what occurred at this meeting at the Flintkote offices.

455-456:

Q. What occurred before Mr. McAdow? A. We met him there at that office and shook hands and he mentioned that he thought we were adequately financed to do the job that they expected of us.

646-647:

Q. * * * Are you able to state from your own knowledge that there are in some instances among these documents wherein the Downer Company simply was trying to accommodate another contractor * * *? A. I most certainly do, because these take offs represent an area that I was working in and it was up to me to decide whether we wanted to bid the job or not.

Q. Now, your position with Downer was that of a salesman on commissions? A. That is true.

Q. And you regarded yourself as being employed by the Downer Company? A. No, sir.

Q. Well, what relationship did you think you had with the Downer Company? A. That I acquired work and that we would do the job together, of which I was to share a certain amount on the profits. * * *

658:

Q. How often did you go to the Downer office when you were working for Downer, during that period, just on an average? A. Probably a couple of times a week.

Q. No oftener than that? A. It would vary. I might be in there every day of the week. I might not be in there for a whole week, depending on the reasons I had to go in there.

660:

Q. What did you do day by day in your work with the Downer Company? What was the nature of your work generally? A. I would call on general contractors and take off plans that they may have and compute costs and big work, attempt to follow that work to see if I were successful or able to convince the people that they ought to let me do the work. * * *

Q. Did you consider yourself free to go and take a job for Coast or for Hoppe or for any other company during this period, if you saw fit, at your pleasure at any time? A. I won't say that I would take a job and give it to any one of the other companies, because it wouldn't be to my benefit, but if I so chose I probably could.

Q. You felt no obligation at all to give all your work to the Downer Company? A. I felt an obligation to make money for myself.

Q. For yourself only? A. That is the only reason I got the work; not to benefit the Downer Company.

706:

Q. (By Mr. Black): What is the basis for your assumption that you would have sold one car per month during the year 1952? A. *This, Mr. Black: We were not starting a new business, we were just starting a new name. We had been in the business for a long time and had these associate contracts over the years.* (Emphasis added.)

We are sure—at least I am, that that would take place. You understand the lag, Mr. Black, of the first few months of your contracts, until building time, and in a case like that you might install, or we would probably install the most of that year's material average in the last six months. That has been done.

713-714 (Waldron—redirect):

Q. Now, Mr. Black has asked you about your initial cash deposits with the aabeta company, Mr. Waldron, and I call your attention to Plaintiff's Exhibit 1 in evidence and ask you whether or not in obtaining this Flintkote supply you pledged the assets mentioned in that statement. A. That is right, sir.

* * *

Q. (By Mr. Ackerson): What was the total amount of those assets shown by that statement? A. $50,250.10.

* * *

Q. Now, Mr. Waldron, did you mean to testify in your direct examination that you based your estimate of the aabeta company's losses in any wise on the capital of the Downer Company? A. I don't believe I did.

Q. Did you base it upon the total sales of the Downer Company? A. No, my sales.

Q. You based it on your sales? A. That is right.

Q. Without regard to other salesmen who may have been working at the Downer Company? A. That is right.

Q. Were there other salesmen besides you and Mr. Lysfjord? A. Yes, I believe there were three or four others.

Q. But your estimates were based upon the performance only by yourself and Mr. Lysfjord, is that correct? A. That is correct.

980-981 (Baymiller):

Q. But you do know as a representative of Flintkote, assistant sales manager of Flintkote, that all of the sources of AMA tested tile that was sold in this area, at that time, were in the hands of the acoustical tile contractors already then operating in Los Angeles, did you not? A. Yes, I understood—*I would make that statement, that the lines were all taken up.* (Emphasis added.)

782 (Ragland direct):

A. After I was assigned to this acoustical tile duty by the company, it was my purpose to move through the Pioneer Division, which comprises the 11 Western States, for The Flintkote Company, and establish persons that might be interested in selling our acoustical tile. Persons that *knew something about the acoustical tile business and had some money to establish their own business.* * * * (Emphasis added.)

789 (Ragland):

Mr. Lysfjord, I believe—I know he had a portfolio of jobs he had secured from various contractors, assigned to the Downer Company, through where he was employed—where he was employed.

He presented those papers to Mr. Thompson.

Mr. Thompson thought that was fine, he must be a wonderful salesman, he said, to secure those contracts.

794:

Q. Now who was Mr. Harkins? A. Mr. Harkins was the general sales manager of the Pioneer Division of The Flintkote Company.

Q. Any particular department? A. Building Materials Department.

Q. Did you arrange such a meeting with Mr. Harkins? A. Yes, sir, we did.

Q. And what took place, if you were present? A. Mr. Lysfjord and Mr. Waldron came into our office and Mr. Thompson and I took them into Mr. Harkins' office.

Mr. Harkins stated that he was glad to meet them, and that we were glad to have two men of their capabilities handling our acoustical products. (Emphasis supplied.)

826 (Ragland's Cross-examination):

Did you indicate to Mr. Lysfjord, in view of your experience, as to his past experience in the field you would like to have him on Flintkote's team? A. Words to that effect, yes, sir.

830:

Q. *And you did feel that they were amply qualified?* A. *I felt that.* (Emphasis added.)

Q. And would do Flintkote a good job? A. Yes, sir.

Q. And would aid Flintkote's sale of acoustical tile? A. Yes, sir.

854:

Q. *At that time did you still feel that you wanted Waldron and Lysfjord on the Flintkote team?* A. *I continued to feel that way, yes, sir.* (Emphasis added.)

Q. And have you any reason to believe that Mr. Baymiller at that time felt the same way, after talking with Lysfjord? A. Yes, sir.

856:

Q. Do you recall prior to the second meeting at the same place having recommended the plaintiffs to Mr. Thompson as Flintkote outlets? A. I can't specifically remember it. *Undoubtedly I did.* (Emphasis added.)

Q. You must have? A. I must have, that is correct.

Q. You wanted them on your team and you recommended them very highly whenever you could, didn't you? A. That is true.

859:

Q. Had you stated, either prior to this meeting or at this meeting, or did you indicate at this meeting, that you still wanted Waldron and Lysfjord on the acoustical tile team of Flintkote? A. I did.

Q. At all times you recommended them very highly to whoever you talked to? A. Every chance I got.

* * *

860:

Q. And you were promotion man for acoustical tile in the area? A. Yes, that is right.

866:

Q. In other words, when Mr. Thompson left that meeting he wanted these people on his team, too, didn't he? A. That is the impression he gave me.

871:

Q. Now, then, you stated that you and Mr. Thompson escorted them into Mr. Harkins' office? A. Yes, sir.

Q. Was Mr. Harkins what we call in the vernacular the top boss down there in your field? A. He was the top man as far as I was concerned, yes, sir.

Q. He was what, he was general sales manager? A. He was general sales manager of the Pioneer Division.

Q. For the 11 western states or something? A. Yes.

Q. For all building materials? A. All building materials, yes, sir.

964 (Baymiller):

Q. Mr. Ragland said very little at that meeting, did he? A. I would say that he didn't have much to say.

Q. The purpose of the meeting was to show to you that the high recommendations that Mr. Ragland had previously given you concerning these two plaintiffs were

true, he wanted you to meet them and approve them too, didn't he? A. Yes.

829-830 (Ragland):

Q. (By Mr. Ackerson): Mr. Ragland, sometime subsequently after the termination you did contact the Downer Company, did you not, and inquire about the plaintiff Lysfjord and plaintiff Waldron's activities there? A. Yes, sir.

Q. You found, did you not, upon that inquiry, they were two of the top salesmen down there? A. Yes, sir.

Q. You found their monthly commissions ranged from a thousand dollars upward, didn't you? A. In that neighborhood, yes, sir.

APPENDIX D.

Finality of Act of Damage.

Black's preliminary opening statement "after discussing the matter in the Flintkote circles, it was decided that in this situation there was nothing to do but to terminate this relationship."

239 (Waldron's testimony to which there was no objection):

At any rate, Mr. Thompson said that we were not to get any more acoustical tile, and that was his superior's decision, because we were operating in the Los Angeles area.

I asked him about the agreement we had at that luncheon that day, about wherever we work, and they had no restrictions on where we worked, and they didn't even tell us not to work in the Los Angeles area. As a matter of fact, they were most happy we could continue with the business we had been doing here. * * *

240:

Q. Yes. That is better. What did Mr. Thompson say when you reminded him of this? A. He said, "We have nothing to do with it. That—" I think he used the words "higher-ups." That is what is in my mind at the moment, and I believe I am right. That the higher-ups decided this, and "All we are to do is to carry it out, the order."

* * *

Q. Do you recall anything Mr. Lysfjord said? A. He pointed out the fact that they were back-watering on their former agreement, and that there was nothing ever [95] said about not doing busines in any place. It was all agreed to do business every place and to get going.

257-258:

Q. (By Mr. Ackerson): As I stated, Mr. Waldron, you were testifying at [115] the close of yesterday's session concerning the so-called termination meeting in or about February 19, 1952. Do you recall any other conversations at that meeting that you have not covered as of yesterday? A. I believe we covered the severance—the termination in their voicing to us at that time—and of course it was like exploding slightly a bomb in our office—but I asked Mr. Baymiller if they wouldn't hold up, or why they didn't hold up, to our agreement, and that I said the pressure must have been terrific. And he said, "Yes, we had the pressure all right."

Q. Was there anything else you recall, or does that about cover that meeting? A. I mean that plus your testimony of yesterday. A. I believe I covered the fact that they said that they couldn't do anything on their own behalf, that it came from their superiors.

487 (Lysfjord's testimony to which there was no objection):

Mr. Thompson said that they were sorry, but from this time on they were unable to supply us with Flintkote tile. * * *

953 (Baymiller):

Q. What, if anything, did you personally do after that conference? A. In company with Mr. Thompson and Mr. Ragland I proceeded to the Bell Avenue address, the next day I believe.

* * *

954:

The Witness: Mr. Lysfjord or Mr. Waldron, one of the two of them, asked then, *"Do you really mean that*

we are no longer a Flintkote customer, that we can no longer buy?" (Emphasis added.)

And Mr. Thompson answered that that is correct.

955:

Q. Specifically did Mr. Thompson say that he was sorry he had to make this decision because he was ordered to do so by higher-ups in the company? A. He could have placed it with those words, but I do not recall his exact words.

993 (Thompson Cross-examination):

Q. That was at the time Mr. Harkins told the three of you to go out and terminate, wasn't that it? A. That was a few days—the report was a few days prior to that, yes.

995:

Q. Well, that brings us up to this termination meeting. As I recall it, you, Mr. Thompson and Mr. Ragland were all called into Mr. Harkins' office, the three of you? A. That is correct.

Q. And Mr. Harkins instructed the three of you to go out to the Bell address and notify these people that they could no longer buy Flintkote tile? A. Yes, sir.

Q. That was your sole purpose in going out there? A. That and to explain to them on the terms of how we were terminatitng them.

999:

Q. Then I believe you testified that Thompson immediately said that the Flintkote Company could no longer sell them acoustical tile? A. That is correct.

Q. And you stated that either Lysfjord or Waldron said—and I am quoting from your testimony—"Do you really mean that we are no longer a Flintkote customer, that we can no longer buy?" And that Mr. Thompson answered, "That is correct."

Do you recall that testimony? A. Yes, sir, I recall that.

Thompson:

Q. Who made the decision with respect to terminating your relations with the plaintiffs? A. Well, Mr. Harkins and myself, with Mr. Baymiller and Mr. Ragland, discussed the situation very thoroughly, and I believe Mr. Harkins decided that the understanding must be terminated, and we agreed with that decision.

Q. Did you volunteer to do this job or were you asked to do it? A. *Well, it was my duty to do it. I wasn't—there was no special request.* (Emphasis added.)

Q. Did you select persons who would accompany you on this mission? A. Yes.

Q. How was that meeting arranged, if you know? A. I believe Mr. Ragland made the appointment.

Q. And then did you proceed with the other two direct to the Bell office? A. Yes.

* * *

Q. What was said at that meeting, as nearly as you can recall? A. Well, we didn't waste any time. I told the plaintiffs that we felt, we understood—we knew actually that the understanding which we had had with them, regarding their operation, had been violated.*

That we could not go along with a program of that kind. That we felt we must terminate any arrangement we might have had with them at once. (Emphasis added.)

1057 (Harkins):

Q. (By Mr. Black): You had the determination of that policy in your own hands, did you not? A. I did.

*The jury's verdict repudiated this defense of alleged breach of contract and the Circuit Court of Appeals' decision makes it irrelevant here.

Q. You didn't have to get any orders from anybody else? A. No, sir.

Q. And who fixed the policy? A. I did.

1071:

I said, "You and Mr. Thompson will take that responsibility and tell the people we will no longer consider them as approved acoustical contractors.

1072:

Q. What happened then? A. Mr. Thompson went, I presume went to their place. I didn't go with him. Mr. Baymiller did go.

And he advised the gentlemen we were terminating our sales agreement with them, we were no longer going to consider them as approved contractors. (Emphasis added.)

1096:

Q. You told Thompson, Baymiller and Ragland to traipse out to the house and out to their plant and wait for them, didn't you? A. *No, I told them to go cancel the agreement.*

1097:

* * * *we were going to remove them from the list of approved acoustical contractors and cease to sell them*

* * *

Q. That was just shortly— A. *And I said to Mr. Thompson, "This is your job, you handle it."*